92-1019

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

SIERRA TELCOM SERVICES, INC.,

Petitioner,

against

THOMAS F. HARTNETT, in his capacity as Commissioner of Labor, and STATE OF NEW YORK DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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(2596—LC7-827—1992)

100 pp.

QUESTIONS PRESENTED

1. Has the State of New York violated petitioner's rights under the Fourteenth Amendment to the United States Constitution by delegating its legislative authority to establish statutory prevailing wages to a labor union in direct contravention of the holding of the United States Court of Appeals for the Second Circuit in *General Electric Co. v. New York State Department of Labor,* 936 F.2d 1448 (2d Cir. 1991)?

2. Has the State of New York violated petitioner's rights under the Fourteenth Amendment to the United States Constitution by seizing property without standards and without notice, and holding that property for two years without a hearing in contravention of this Court's holdings in *Connecticut v. Doehr,* ____ U.S. ____, 111 S. Ct. 2105 (1991); *Barry v. Barchi,* 443 U.S. 55 (1979); *Mathews v. Eldridge,* 424 U.S. 319 (1976); *Fuentes v. Shevin,* 407 U.S. 67 (1972); and *Goldberg v. Kelly,* 397 U.S. 254 (1970)?

3. Has the State of New York violated petitioner's rights under the Fourteenth Amendment to the United States Constitution by imposing and collecting a $100,000 penalty without notice, without any basis, and without affording a hearing?

4. Has the State of New York violated petitioner's rights under the Fourteenth Amendment to the United States Constitution by holding a hearing 23 months after the seizure, before an at-will employee of the agency that seized the property, without notice of the conduct which resulted in the seizure of the property; by denying petitioner's application for a subpoena of records; by relying on testimony that is

solely hearsay; and by denying petitioner the right to cross-examine witnesses in contravention of this Court's holdings in *Barry v. Barchi*, 443 U.S. 55 (1979), and *Goldberg v. Kelly*, 397 U.S. 254 (1970)?

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992.

SIERRA TELCOM SERVICES, INC.,

Petitioner,

v.

THOMAS F. HARTNETT, in his capacity as Commissioner of Labor, and STATE OF NEW YORK DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

The petitioner Sierra Telcom Services, Inc. respectfully prays that a writ of certiorari issue to review the order and opinion of the New York State Court of Appeals in this case.[1]

[1]The parties to this action are set forth in the caption. As required by Rule 29.1 of this Court, it is hereby set forth that Sierra Telcom Services, Inc. has one subsidiary company, Sierra Pools, Inc.

OPINIONS BELOW

The opinion of the New York State Court of Appeals denying Sierra's motion for leave to appeal (Appendix "A") is reported at 80 N.Y.2d 757, ____ N.Y.S.2d ____ (1992).

The opinion of the New York State Court of Appeals denying Sierra's motion, *sua sponte,* to appeal as of right (Appendix "B") is reported at 79 N.Y.2d 1039, 584 N.Y.S.2d 448 (1992).

The opinion of the New York State Supreme Court, Appellate Division, Third Department, affirming the Order and Determination of the Commissioner of Labor (Appendix "C") is reported at 174 A.D.2d 279, 579 N.Y.S.2d 753 (3d Dept. 1992).

The Order and Determination of the New York State Commissioner of Labor is unreported. It is set forth as Appendix "D".

JURISDICTION

The order of the New York State Court of Appeals (Appendix "E") was entered on September 15, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved are set forth in pertinent part in Appendix "F". They are:

United States Constitution, amend. V;

United States Constitution, amend. XIV;

28 U.S.C. § 1257(a);

New York State Finance Law § 137;

New York Labor Law § 220; and

New York Labor Law § 220-b.

STATEMENT OF THE CASE

The New York State Labor Law requires that all persons performing labor on a public works project be paid the "prevailing wage" for the task performed. While the statute is similar in intent to the Davis-Bacon Act, unlike the United States Department of Labor the State does not publish a classification of trades, nor has it adopted the federal classifications. Classifications under the State statute are made on an *ad hoc* basis after the fact. The classifications are based on the tasks actually performed by the worker. The State statute allows "prevailing wages" to be determined from a bona fide union-employer agreement covering similar tasks in the locality.

In May of 1988, the State University of New York at New Paltz (herein "SUNY") entered into a contract with Ericsson Business Communications, Inc. (herein "Ericsson") for the installation of a communications system. Ericsson entered into a subcontract with the petitioner, Sierra Telcom Services, Inc. (herein "Sierra"), to perform part of the work on that project. Sierra is a merit shop, or nonunion contractor. *Ericsson was required to, and did, furnish surety bonds guaranteeing completion of the project and payment of all laborers employed on the project by Ericsson and its subcontractors.*

The New York State Department of Labor (herein "Department"), Bureau of Public Works, had issued prevailing wage rate schedules which were made part of the contract documents. The schedules included prevailing wage rates for substantially all categories of workers from "elevator constructor" to "welder" and included such classifications as "electrician-lineman" and "telephone installer". The schedules did not identify or describe in any way the specific tasks or job responsibilities of any of the categories listed. In contravention of § 220 of the New York Labor Law, neither the Department nor SUNY classified the workers to be used nor informed Sierra or Ericsson what categories on the schedules were to be utilized in classifying workers performing various tasks on the project.

The prevailing wage rate schedule at the beginning of the project indicated that the prevailing wages on the project would be the wages determined from a contract between International Brotherhood of Electrical Workers (herein "IBEW") Local # 806 and the union contractors in the area. That schedule called for wages ranging from $7.45 to $24.46 per hour based on the tasks performed. On July 1, 1988, IBEW Local # 806 was taken over by IBEW Local # 631. Local # 631 had a separate telephone interconnect agreement with local employers which covered skilled technicians, the lowest paid of which was "telephone installer" starting at $16.25 per hour plus fringe benefits of approximately $3.95 per hour. That agreement did not cover less skilled employees or those performing nontechnical tasks such as floor sweeping, unloading trucks and opening boxes.

While work on the project was being performed, new prevailing wage rate schedules were distributed, including telephone installers at $16.25 per hour plus $3.95 in benefits. *Neither the schedule nor the union contract had a description*

of the tasks included in the title "telephone installer" or the skills required to earn that rate of pay.

Sierra commenced work on the project on June 11, 1988. Over a period of three months, Sierra employed a total of 81 different people on the project, although not all were employed at the same time.

On August 1, 1988, Department Investigator Kevin Jones (herein "Jones") visited the job site. Jones' mandate was to investigate whether prevailing wages were being paid by Sierra.[2] At that time, Jones interviewed approximately eight employees. At the conclusion of those discussions, Jones served Sierra's Project Manager with a NOTICE OF LABOR LAW INVESTIGATION FINDINGS. The form indicated some minor technical violations. Although there is a specific space on the form to note prevailing wage rate violations, no prevailing wage violations were noted. Investigators are provided with a contact sheet on which they are required to note wage violations. No such violations by Sierra were noted on the contact sheet. At the conclusion of that first meeting, Jones informed Sierra's Project Manager that he would return in approximately two weeks to determine whether the minor technical violations had been corrected.

On August 4, 1988, Jones informed his supervisor that Sierra was "paying (its) men for the most part under the groundman class of lineman . . . . Upon checking with the linemen union I find that their agreement *does* cover this work

[2]Upon finding a violation of the prevailing wage rate statute, an investigator is required to note that finding on what is called a "contact sheet", to issue a NOTICE OF LABOR LAW INVESTIGATION FINDINGS indicating that there is a prevailing wage rate violation, and in the case of a subcontractor such as Sierra, to notify the prime contractor, in this case Ericsson, of the violation.

. . . ." (A. 68)[3] (emphasis in original). Sierra was paying an amount equal to lineman's pay under the electrical worker's prevailing wage.

On August 19, 1988, Jones again visited the job site. Again he served a NOTICE OF LABOR LAW INVESTIGATION FINDINGS. Again, no prevailing wage rate violations were indicated on the form or on his contact sheet.

On November 7, 1988, Jones returned to the job site. At this visit, Jones did not serve a NOTICE OF LABOR LAW INVESTIGATION FINDINGS, nor did he note any prevailing wage violations on his contact sheet. Sierra continued its work on the project without any further communications with Jones or anyone else at the Department. The project was substantially completed in November, 1988.

In late November, Jones discussed Sierra with a business agent from IBEW Local # 631. *Jones testified that the business agent claimed jurisdiction for his local over all telephone interconnect projects, "[e]verything from unloading the trucks when they get there to cleaning it up at the end."* (A. 372).

On November 25, 1988, Fred Morlock, Senior Investigator for the Department, without notice or opportunity to be heard or any specification of the reason therefor, but solely on the union business agent's claim, issued a notice to SUNY instructing it to withhold from payments to Ericsson the sum of $505,331.10 due to the claimed failure by Sierra to pay prevailing wages. Of that sum, $348,504.21 was claimed to be unpaid wages, $55,760.67 was interest at 16%, and $101,066.22 was a penalty imposed by Mr. Morlock. Mr. Morlock had determined that every person employed by Sierra

[3](A. ____) refers to the Joint Appendix from the appeal to the Appellate Division, Third Department.

on the project was entitled to be paid at least the telephone installer's rate of $16.25 per hour plus $3.95 in benefits no matter what task he or she performed. *He further determined that Sierra had willfully refused to pay that rate and was therefore liable for the highest penalty allowed by law. No NOTICE OF LABOR LAW INVESTIGATION FINDINGS was prepared or served as required by statute indicating a prevailing wage violation.*

Ericsson in turn withheld the same amount from money due to Sierra.

The actual seizure of the contract balances made after the completion of the project was the first notice given to Sierra or Ericsson of any claim of a prevailing wage violation.

With the exception of one notation made by Mr. Morlock that $16.25 is the hourly rate to be applied, there is nothing in the Department's file indicating how the determination was made.

There was No Meaningful Hearing within a Meaningful Time

A hearing was held before Assistant Commissioner of Labor Florio A. Vitullo on October 4 and 5, 1990. Contrary to law, the hearing date was some 23 months after the seizure of petitioner's property.[4]

The investigation was instigated by an employee of the Department of Labor; the investigation was conducted by an employee of the Department of Labor; the imposition of a penalty was made by an employee of the Department of Labor; the seizure of petitioner's funds was made by an em-

[4]The statute provides that the Commissioner of Labor "shall make an order or determination [on a prevailing wage complaint] not later than six months after the filing of such verified complaint." Labor Law § 220(7).

ployee of the Department of Labor; the hearing was held before an employee of the Department of Labor; the only witness at the hearing was an employee of the Department of Labor; the hearing officer was an employee, the Assistant Commissioner, of the Department of Labor; and the Order and Determination on the hearing officer's report was made by the Commissioner of Labor.

The Order and Determination was in favor of the Department.

Refusal to Issue Subpoena

Prior to and during the hearing, both Sierra and Ericsson requested that the hearing officer issue a subpoena duces tecum for the records of the Department. The Department opposed the issuance of the subpoena on the ground that petitioners had been provided with the Department's complete file. The requests were denied.

At the beginning of the hearing, the Department *admitted it had additional documents* which it then produced for the first time. During the hearing, on cross-examination of the Department's only witness, it was discovered that the Department had yet another critical document—*a procedure manual*—which it had not produced. It was required to produce that manual at the hearing.

During the hearing, the *Department's only witness*, after first denying the existence of any information provided by Sierra describing the duties performed by its various employees, *admitted that, in fact, he had been provided with written material on the employees. He was not required to produce that material at the hearing.* He did not do so.

The Conduct of the Hearing and the Deprivation of the Right of Cross-Examination

The hearing officer accepted into evidence three unsworn statements by former employees of Sierra. The statements had been obtained by the investigator some months after the seizure of Sierra's property. Substantial portions of the statements had been written by the investigator.

At the time of the hearing, the Department could not locate any of the former employees who made those statements. *Solely by reason of the Department's delay in conducting the hearing, petitioner was deprived of its right of cross-examination as to the matters contained in the statements or even whether the investigator's writing accurately reflected the employees' thoughts.*

At the hearing, the investigator testified that in order to properly classify employees under New York law, he would need to know the specific job duties and responsibilities of each of the individuals involved. He testified that he did not know the duties of *any* of Sierra's 81 different employees, except for three men from whom he took statements after the seizure of petitioner's property. *He testified that he did not know the duties performed under the job classification of "telephone installer". He testified that there was and is no definition of the duties of a telephone installer.*

The Unlawful Delegation of Legislative Authority

The investigator's testimony which was the basis of the Department's determination was that sometime in November of 1988, he had contacted a business agent for IBEW Local # 631. He was informed by the business agent that IBEW Local # 631 claimed jurisdiction over all workers on telephone installation projects in its area. He was further informed that

its jurisdiction embraced "[e]verything from unloading the trucks when they get there to cleaning it up at the end." (A. 372). In other words, no matter what the task performed, anyone employed on a telephone interconnect project was entitled to at least telephone installer wages according to the IBEW business agent's hearsay judgment. The investigator testified that the classification of employees was based solely on this conversation. Neither the task performed nor the amount and type of experience and skill of Sierra's various employees were factors in determining the wage classification. The classification was made solely on the basis of the union's claim of jurisdiction. *He testified that prior to the merger of the Locals, at the time the contract was entered into, the method of classification had been different. On the merger of the local unions he simply applied the "telephone installer" rate, no matter what tasks the worker performed.*

On March 19, 1991 (28 months after the seizure of property), Assistant Commissioner Vitullo issued his Report and Recommendation in this matter. Assistant Commissioner Vitullo determined that Sierra violated Labor Law § 220(3) because it underpaid all 81 of its employees by failing to pay a sum equivalent to at least a union "telephone installer" wage to each employee for work performed on the project. The Assistant Commissioner found that the violation was willful and imposed a penalty of 10% of the unpaid wages—some $62,000.00 less than the penalty imposed by Mr. Morlock and seized by the State some 28 months earlier.

Assistant Commissioner Vitullo specifically based his decision on his finding that the union determined the amount to be paid to workers on the project. (A. 245-48).

By Order and Determination dated March 29, 1991, the Commissioner adopted the Report and Recommendation of the Assistant Commissioner.

Petitioner appealed from the Order and Determination to the New York State Supreme Court, Appellate Division, Third Department. The Court affirmed the Commissioner's decision. The Court based its affirmance, at least in part, on the investigator's reputed conversation with the union business agent and the supposed claim of the union that telephone installation "embraced '[e]verything from unloading the trucks when they get there to cleaning up at the end.'" *Sierra Telcom Services, Inc. v. Hartnett*, 174 A.D.2d 279, 284 (3d Dept. 1992).

The Constitutional Questions Presented Here Were Preserved Below

In the post-hearing briefs submitted by respondents to the Department,[5] the constitutional questions here presented were specifically raised in Points V and VII of the Sierra Brief and Point I.A. of the brief of its co-respondent Ericsson. The New York State Court of Appeals has specifically held that the constitutional challenge to an administrative agency's action need not be raised before the administrative agency to be preserved for appeal. *Watergate II Apartments v. Buffalo Sewer Auth.*, 46 N.Y.2d 52, 57 (1978).

The constitutional questions here sought to be reviewed were raised by Sierra in its petition for review to the New York State Supreme Court, Appellate Division, Third Department and in the briefs submitted in support of that petition, specifically in Points III, IV, V and VI of the original brief and Points I and IV of the reply brief. The Appellate Division specifically

[5]Petitioner Sierra and Ericsson were respondents in the State administrative proceeding.

held that Sierra's reliance on *General Electric Co. v. New York State Department of Labor,* 936 F.2d 1448 (2d Cir. 1991), for the proposition that delegation to a labor union of legislative authority to establish prevailing wages is unconstitutional was misplaced. *Sierra,* 174 A.D.2d at 285. It found Sierra's other constitutional arguments lacking in merit.

The constitutional issues were raised in the New York State Court of Appeals: (1) by the filing of the briefs in the Appellate Division and a Jurisdictional Statement as required by § 500.2 of the Rules of Practice, Court of Appeals, 22 N.Y.C.R.R. § 500.2, in order to justify an appeal as of right to the Court; (2) in Sierra's comments to that Court justifying subject matter jurisdiction; and (3) in Sierra's subsequent motion for permission to appeal to the Court of Appeals and the brief in support of that motion, more particularly in Point III.

The Court of Appeals dismissed Sierra's appeal as of right and denied leave to appeal, both without opinion.

POINT I

THE STATE UNCONSTITUTIONALLY DELEGATED TO A LABOR UNION ITS LEGISLATIVE AUTHORITY TO ESTABLISH PREVAILING WAGES

The New York State Labor Law provides that a worker must be paid the wage prevailing in the area for the "work performed". It further provides that the prevailing wage may be determined from a collective bargaining agreement if 30% of the employees in the area are represented by a union. Labor Law § 220(5)(a).

The statute is very clear that

> [I]t shall be the duty of the department of jurisdiction [SUNY] . . . to ascertain . . . the classification of workmen, mechanics and laborers to be employed on such project. . . . [I]t shall be the duty of the fiscal officer [the Commissioner of Labor] to make a proper classification of . . . whether the work is heavy and highway, building, sewer and water, tunnel work or residential and to make a determination of the schedules of wages and supplements to be paid or provided.

Labor Law § 220(3-a)(a).

In the instant case, the State completely abrogated its responsibility and delegated that classification duty to IBEW Local # 631. *That delegation was an unconstitutional delegation of legislative authority.*

In a decision concerning the application of the same statute involved in the instant case, the United States Court of Appeals for the Second Circuit analyzed the law applicable to the delegation by the State of its legislative authority to establish prevailing wages. The Circuit Court held that such a delegation, if proven, would be unconstitutional. *General Electric Co. v. N.Y.S. Dep't of Labor,* 936 F.2d 1448 (2d Cir. 1991) (herein *"General Electric"*). In the instant case, that delegation is the sole basis of the State's prevailing wage determination.

In *General Electric,* the Second Circuit stated, "the Supreme Court teaching is that the due process clause 'places limits on the manner and extent to which a state legislature may delegate to others powers which the legislature might admittedly exercise itself.' " *Id.* at 1454 (quoting *McGautha v. California,* 402 U.S. 183, 272 n.22 (1971)).

Citing a number of decisions of this Court, the Second Circuit went on to say that *"[t]hese opinions still stand for the proposition that a legislative body may not constitutionally delegate to private parties the power to determine the nature of rights to property in which other individuals have a property interest, without supplying standards to guide the private parties' discretion.* Otherwise, 'administrative decision-making [will be] made potentially subservient to selfish or arbitrary motivations or the whims of local taste.' " *Id.* at 1455 (quoting *Geo-Tech Reclamation Indus., Inc. v. Hamrick,* 886 F.2d 662, 666 (4th Cir. 1989)) (emphasis supplied).

The Statute as Applied is an Unconstitutional Delegation of the State's Legislative Authority

In *General Electric,* the question before the Court was whether by adopting the union wage schedule without exercising any discretion, as was done here, the State had delegated its legislative authority unconstitutionally. The Court said:

> Thus, the Department's procedures seem not to involve the exercise of any discretion in setting prevailing wage and supplement rates. The State's insistence that it does not merely take whatever rates the unions submit, but sets the prevailing rate at that actually paid in the locality may well be the case, but we must take as true for purposes of this appeal GE's allegations regarding the actual procedure followed by the State. . . . If this two wage rate system was collusively negotiated, and simply adopted *pro forma* by the state (without exercising any discretion) as the resulting wage rates, this would clearly establish an unconstitutional delegation of authority under the statute as applied.

Id. at 1458-59.[6]

What the Second Circuit proscribed in *General Electric* is exactly what has been done in the case at bar.

The Department of Labor as complainant, the Department of Labor as adjudicator, the Attorney General of the State of New York as attorney for the Department, and the State courts all have clearly stated that *the sole reason* for classifying the Sierra employees as telephone installers *is that a union business agent claimed all work on a telephone interconnect project* for his Local's members.

There has been no pretense by the Department of exercising any discretion. The State has clearly enunciated its position that it is applying the classification of telephone installer to every employee on the subject project no matter what the work performed *solely because IBEW Local # 631 claimed that it "controls" all jobs on a public telephone interconnect project in its area.* In other words, no matter what the work performed, a worker on a public telephone interconnect project is entitled to telephone installer wages in this Local's area of jurisdiction.

The State's only witness testified that prevailing wages were to be determined by the fact that a union local claimed that it controlled all tasks associated with the installation of a telephone interconnect system and that any worker on that job was entitled to the pay of a skilled union technician.

This is not just the testimony of a low-level investigator. This is the position adopted by the State in all of the papers submitted at the administrative hearing and to the courts on

[6]The Court then remanded the case for further discovery which had been opposed by the State. The case was settled before a final determination was made.

Sierra's appeal from the adverse administrative determination. It is the position adopted by the New York State Supreme Court in deciding that appeal.

The State set forth this position in its brief to the New York State Supreme Court, Appellate Division, Third Department, as follows:

> Jones[7] testified that *under this [union] agreement,* installing a telephone system includes all work performed on a telephone installation project from unloading trucks when they arrive, to clean-up at the end. Jones testified that *because of the agreement* all workers on the project were classified as telecommunication workers, entitled to at least the lowest wage rate in the agreement. (Department brief, p.8 (emphasis supplied))[8].
>
> * * *
>
> Nevertheless, the Commissioner correctly found that, in this case, every worker on the project is entitled to the telephone installer wage rates *because this was the prevailing practice under the governing collective bargaining agreement.* (Department brief, p.13 (emphasis supplied)).
>
> * * *
>
> *After reading the Telephone Interconnect Agreement, and speaking to the business agent of that union,* Jones concluded that all those working on a public work telephone installation project in Ulster County came

[7]Jones was the State's investigator and the only witness at the hearing before Assistant Commissioner Vitullo.

[8]Neither Ericsson nor Sierra were parties to the agreement.

> under this agreement and were entitled to, at a minimum, the lowest wage rate paid under the agreement. As described by Jones, *the practice under the Telephone Interconnect Agreement* was that "everything from unloading a truck to when they get there to cleaning up at the end was included in the installation of a telephone system." (Department brief, p.15 (emphasis supplied)).
>
> * * *
>
> The Department did not establish the precise nature of the job of most of the workers on the project. Instead, the Department classified almost all the workers on the project at the lowest telephone rate, as a telephone installer. (Department brief, p. 17).

Assistant Commissioner Vitullo adopted that position saying that "[h]e [Jones] also contacted the Business Agent representing the *unions which established these classifications and prevailing wage schedules* by law (§ 220-5a,b,c)." (A. 174) (emphasis supplied).

The New York State Supreme Court, Appellate Division, Third Department, affirmed saying that:

> Jones, who reviewed the above-described [union] agreement and discussed the matter with the union's business agent, testified that telephone installation embraced "[e]verything from unloading the trucks when they get there to cleaning it up at the end". *Under the collective bargaining agreement,* all workers doing telecommunications work in the locality were to be paid one of four telephone technician wage rates. Thus, the Commissioner could properly conclude that, despite the Department's inability to determine the spe-

> cific job duties of each Sierra worker, all 81 workers were entitled to receive, at a minimum, the wage rate for telephone installer, the lowest of the four rates.
>
> *Sierra Telcom Services, Inc. v. Hartnett,* 174 A.D.2d 279, 284 (3d Dept. 1992) (emphasis supplied).

The Court of Appeals denied permission to appeal, thus denying a review of the holding below.

The situation here is exactly the same as that which the Second Circuit characterized as an unconstitutional delegation of legislative authority. *See General Electric,* 936 F.2d at 1458. On the issuance of the opinion on the second appeal in the *General Electric* case, the State settled with the plaintiff.

This is a matter which eventually will have to be decided, as it should be, by the federal courts. In fact, the State of New York had petitioned for certiorari on the first *General Electric* appeal. *See General Electric Co. v. New York State Dept. of Labor,* 891 F.2d 25 (2d Cir. 1989), *cert. denied,* 496 U.S. 912 (1990). In the instant case, the State has made quite clear its position on the role of the union in establishing the prevailing wage. Unless determined now, this question will come up again in the federal courts. It will be subject to the same processes as the *General Electric* case with very lengthy and expensive discovery, motions for summary judgment and appeals. Granting certiorari in this case not only will allow the Court to address a number of very substantial constitutional issues, it will settle questions that, in the absence of granting certiorari, will consume a very substantial amount of the time of the federal courts and other courts in New York State for years to come.

POINT II

SEIZING PROPERTY WITHOUT NOTICE AND WITHOUT A HEARING, AND HOLDING THAT PROPERTY FOR TWO YEARS WITHOUT A HEARING IS AN UNCONSTITUTIONAL TAKING OF PROPERTY WITHOUT DUE PROCESS

"[A] contractor has a right to timely payment for work it performs under a contract with a state agency, and . . . such right is a property interest protected by the due process clause." *General Electric*, 936 F.2d at 1453. *See also Signet Constr. Corp. v. Borg*, 775 F.2d 486, 489 (2d Cir. 1985); *Oberlander v. Perales*, 740 F.2d 116, 120 (2d Cir. 1984).

"Once created a property interest cannot be taken except pursuant to constitutionally adequate procedures." *General Electric*, 936 F.2d at 1453.

The seizure of Sierra's property by the New York State Department of Labor completely deprived Sierra of its property, required no court order or affidavit of probable cause, and was not followed by an immediate hearing. In fact, there was no hearing for 23 months.

The New York State Court of Appeals held that there was no substantial constitutional question and dismissed the appeal. That decision was wrong.

This Court has enunciated and developed a doctrine of procedural due process culminating most recently in *Connecticut v. Doehr*, ____ U.S. ____, 111 S. Ct. 2105 (1991). This doctrine compels the conclusion that the acts of the State complained of by Sierra are blatantly unconstitutional.

The essence of due process is a requirement that "a person in jeopardy of serious loss [be given] notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring), cited with approval in *Mathews v. Eldridge*, 424 U.S. 319, 348-49 (1976).

In *Goldberg v. Kelly*, 397 U.S. 254 (1970), this Court held that a deprivation of property (in that case a termination of welfare benefits) without a pre-termination hearing was unconstitutional even though there was an informal pre-termination review and an immediate post-termination "fair hearing".

This Court held, "The stakes are simply too high . . . and the possibility for honest error or irritable misjudgment too great, to allow the termination of aid without giving the recipient a chance, if he so desires, to be fully informed of the case against him so that he may contest its basis and produce evidence in rebuttal." *Id.* at 266.

This Court went on to say in *Goldberg* that "'[t]he fundamental requisite of due process of law is the opportunity to be heard'. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). The hearing must be 'at a meaningful time and in a meaningful manner.' *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)." *Id.* at 267. It was stated further that "[i]n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Id.* at 269.

In *Fuentes v. Shevin*, 407 U.S. 67 (1972), this Court struck down as unconstitutional a Florida statute that allowed a private party to obtain a prejudgment writ of replevin on filing certain forms, without prior notice and without a hearing but

upon posting a bond for double the value of the property seized.

Under the Florida statute considered in *Fuentes*, the property could be regained by filing a bond. *In the instant case, there is no provision for the return of petitioner's working capital even though the State has a bond guaranteeing payment of wages to all persons providing labor on the project either to Sierra or Ericsson.* These are the people for whose benefit Sierra's money ostensibly was seized.

Fuentes clearly enunciated that the protections in *Goldberg* are not limited to the essentials of life. The decision states that "if the root principle of procedural due process is to be applied with objectivity, it cannot rest on such distinctions." *Fuentes*, 407 U.S. at 90.

In the instant case, there was no hearing for 23 months and no determination for 28 months. "If the right to notice and a hearing is to serve its full purpose, then, it is clear that it must be granted at a time when the deprivation can still be prevented." *Id.* at 81. " 'This Court has not . . . embraced the general proposition that a wrong may be done if it can be undone.' " *Id.* at 82 (quoting *Stanley v. Illinois*, 405 U.S. 645, 647 (1972)). This Court, in *Fuentes*, said the fact that a taking is temporary is immaterial. A temporary deprivation of property without due process cannot be countenanced.

In *Mathews v. Eldridge*, 424 U.S. 319 (1976), this Court analyzed its prior decisions to determine what constitutes due process when the government itself seeks to effect a deprivation on its own initiative. That analysis resulted in a threefold inquiry requiring consideration of "the private interest that will be affected by the official action"; "the Government's interest, including the function involved in the fiscal and administrative burdens that the additional or substitute pro-

cedural requirement would entail"; and lastly "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards". *Mathews*, 424 U.S. at 335.

The Private Interest Affected

The significance of Sierra's private interest in being paid for work performed pursuant to a contract cannot be overstated. It is self-evident that payment for services and materials provided is necessary for survival. The impact that the withholding of money used for materials and labor provided can have on a contractor who relies on these payments to pay its bills is devastating, especially in difficult economic times such as these.

The Government Interest

The government's interest in having the payment withheld is solely to ensure a source of funds to satisfy any underpayment of employees pursuant to the prevailing wage rate. This interest is protected by Section 137 of the New York State Finance Law, which requires all contractors performing public work to provide a bond guaranteeing the payment of all monies owed to persons supplying labor to the contractor or to its subcontractor. There was a source of funds for payment of labor, mandated by the State and known to the State.

Affording a contractor an opportunity to respond prior to the deprivation of funds would impose no significant fiscal or administrative burden on the government. A hearing must be held. The delay here only imposed difficulties on petitioner in surviving while awaiting a hearing and in finding witnesses for the hearing.

The Risk of Erroneous Deprivation

Lastly, the risk of erroneous deprivation of funds through the procedures used is substantial. This court, in *Fuentes,* held that a prehearing seizure may be allowed if "the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Fuentes,* 407 U.S. at 91.

Here, the statute does allow the fiscal officer, i.e., the Commissioner of Labor, to *seize funds* sufficient to cover a penalty prior to a hearing. Labor Law § 220-b. *This is not a duty which he is allowed to delegate under the statute.* While we submit that the statute as written is unconstitutional, this may have been the Legislature's attempt to comply with *Fuentes,* in which under certain very limited conditions (which are not present here) a prehearing seizure may be allowed if "the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." *Fuentes,* 407 U.S. at 91. In this case, *the exceptional circumstances allowing a seizure without a hearing were not present nor was the seizure made by the statutorily responsible official.*

A Labor Department Senior Investigator seized an employer's contract payment without either notice or hearing. The seizure was based on the claims of a union's business agent. Taking into consideration the ease by which an employer can be deprived of his property right, the value of affording an employer notice and an opportunity to respond before deprivation of property is great. In this case, in actual fact, there was error. The State seized $62,000.00 to which its own hearing officer found it was not entitled.

In *Barry v. Barchi*, 443 U.S. 55 (1979), this Court reviewed the act of a New York State administrative body in depriving a horse trainer of his license. It held that a suspension, even for 15 days, without provision for a prompt post- suspension hearing is unconstitutional. In *Barry*, the suspension was based on a reliable affidavit and the defendant was given immediate notice of the alleged wrongful act and many opportunities to present his side of the story. Notwithstanding, the suspension was held unconstitutional as applied because the defendant was not afforded a prompt hearing. The circumstances here—no reliable affidavit as a basis for seizure, no opportunity for petitioner to respond and a hearing delayed for 23 months—are even more egregious and equally unconstitutional.

While *Barry* did not involve the seizure of money, Mr. Justice Stevens, in a concurring opinion, pointed out the economic problems of being deprived of one's means of earning a living:

> A final full hearing and determination after Barchi had been barred from racing his horses and had lost his clients to other trainers was aptly described by the District Court as an 'exercise in futility,' 436 F.Supp., at 782, and would certainly not qualify as a 'meaningful opportunity to be heard at a meaningful time.'

Id. at 74.

These words are applicable to the harm worked on petitioner here.

The most recent in this line of cases is *Connecticut v. Doehr*, ____ U.S. ____, 111 S. Ct. 2105 (1991). In *Doehr*, this Court declared a Connecticut statute allowing a court to grant an ex parte order of attachment unconstitutional.

The Connecticut statute did not deprive a person of the use of his property as does the New York statute. The Connecticut statute required an affidavit and complaint showing probable cause and provided for an immediate post-attachment hearing, none of which were present here. Nonetheless, the Connecticut statute was declared unconstitutional because of the absence of exigent circumstances, such as an allegation that the defendant was about to take steps to render his property unavailable to satisfy that judgment. *Id.* at 2115.

Here, the Department has not even asserted the pretext that swift action was required to preserve the fund. It cannot do so because a New York State statute requires that every contractor on a public improvement contract post a bond guaranteeing payment of wages due to those performing labor for the contractor or a subcontractor.

This Court said in *Doehr* "the State cannot seriously plead additional financial or administrative burdens involving predeprivation hearings when it already claims to provide an immediate post-deprivation hearing." *Id.* In the instant case, no additional financial or administrative burdens would have been encountered in granting a predeprivation hearing or even an immediate post-deprivation hearing.

This line of procedural due process cases makes it clear that no governmental interest justified the prehearing deprivation of Sierra's property. Nevertheless, even assuming arguendo that the prehearing deprivation was justified, the unreasonable delay of 23 months in affording Sierra an opportunity to be heard was in and of itself unconstitutional. *See Barry v. Barchi*, 443 U.S. 55, 65 (1979); *Ames Constr. Co. v. Dole*, 727 F. Supp. 502, 511 (D. Minn. 1989).

POINT III

THE IMPOSITION AND COLLECTION OF A PENALTY IN EXCESS OF $100,000 WITHOUT NOTICE AND WITHOUT A HEARING RENDERS THE STATUTE AS APPLIED UNCONSTITUTIONAL

The imposition and collection of a penalty in excess of $100,000 by a low level State employee without notice and without a hearing for 23 months is such egregious conduct that we can find no cases in which it is specifically addressed. We venture to suggest that no one other than the New York State Department of Labor had the arrogance or disdain for the Constitution to even attempt such an act.

However, a fair reading of the cases cited in this petition pertaining to the requirement for a meaningful hearing within a meaningful time confirms that such conduct is constitutionally impermissible.

Certainly the concurring opinion in *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951) indicates that this is prohibited conduct where it states:

> [T]he right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.

Id. at 168.

This language was reiterated in *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976).

The danger in allowing such conduct is demonstrated by this very case. The penalty imposed and collected from Sierra at the outset of this dispute was in excess of $100,000. More than two years later, when the Commissioner of Labor issued his decision, and in spite of all of the infirmities of that hearing (as set forth in Point IV), the penalty imposed was $38,745.00, some $62,000.00 less than that imposed and collected by the senior investigator some two years prior.

This conduct alone renders the statute unconstitutional as applied.

POINT IV

THE STATE DID NOT PROVIDE SIERRA WITH A MEANINGFUL HEARING

A meaningful hearing is one held within a reasonable time, before an impartial decision-maker. The party whose property is to be seized must have not only timely and adequate notice detailing the reasons for the seizure but an effective opportunity to defend by confronting and cross-examining witnesses. The evidence used to prove the government's case must be disclosed so that the respondent has an opportunity to show that it is not true. *Goldberg*, 397 U.S. at 270-71.

In the instant case, prior to the belated hearing, petitioner requested that subpoenas be issued requiring the Department of Labor to provide its file for examination. Those subpoenas were denied on the Department's representation that it had provided all materials in its files. At the hearing, it became apparent that this was not true in two respects. The Department had a procedure manual. It also had information on Sierra's employees. The Department was required to provide a copy of its procedure manual.

The State was not required to produce that information which it had in its file which it had procured from Sierra pertaining to Sierra's employees.

More importantly, the two basic facts upon which the hearing turned were facts not within the knowledge of the State's only witness.

The State's only witness denied any firsthand knowledge of the actual work performed by Sierra's employees. He denied any knowledge of the work performed by "telephone installers", the title under which he classified Sierra's employees.

He flatly stated that *the sole reason that he classified all of Sierra's employees as telephone installers was his conversation with a union business agent,* about which he then testified, notwithstanding that it was rank hearsay to which Sierra objected. There was no opportunity to cross-examine this business agent as to the facts. There was nothing in the record on which the decision-maker could conclude that all of the employees of Sierra were "telephone installers" entitled to $16.25 per hour plus fringe benefits. *See Goldberg,* 397 U.S. at 271.

The only evidence of the work performed by any Sierra employee on this project was three unsworn statements solicited by the witness some three months after the seizure of Sierra's property. The State admitted that these witnesses, who had been available at the time of the seizure and for three months thereafter, no longer were to be found at the time of the hearing. The statements were in the writing of the State Investigator, not of Sierra's employees, and they were unsworn. Sierra had no opportunity to cross-examine those employees as to the contents of their statements or whether, in fact, the writings by the witness properly recorded what they had said.

Sierra's basic right to defend itself, to confront adverse witnesses and to cross-examine adverse witnesses was taken away not only by the actions of the Commissioner in denying subpoenas, but *by the excessive delay in the hearing which made witnesses no longer available.*

CONCLUSION

For the reasons set forth herein, it is respectfully submitted that the petition for certiorari should be granted. In the alternative, it is respectfully requested that this Court reverse and remand this case to the New York State Court of Appeals for a determination of whether the decision of the Commissioner of Labor and the Appellate Division significantly conflict with the holdings of this Court and the United States Court of Appeals for the Second Circuit as set forth in the questions presented and for such other and further relief as is appropriate.

Respectfully submitted this 15th day of December, 1992.

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Appendix A—Opinion of the New York State Court of Appeals Dated September 15, 1992.

Mo. No. 763

COURT OF APPEALS OF NEW YORK

September 15, 1992

IN THE MATTER

OF

SIERRA TELCOM SERVICES, INC.,

Appellant,

v.

THOMAS F. HARTNETT, as Commissioner of Labor, *et al.*,

Respondents.

(Proceeding No. 1)

OPINION:

Motion for leave to appeal denied with one hundred dollars costs and necessary reproduction disbursements.

Appendix B—Opinion of the New York State Court of Appeals Dated May 7, 1992.

Mo. No. 517 SSD 38

COURT OF APPEALS OF NEW YORK

May 7, 1992

IN THE MATTER

OF

SIERRA TELCOM SERVICES, INC.,

Appellant,

v.

THOMAS F. HARTNETT, as Commissioner of Labor, *et al.*,

Respondents.

(Proceeding No. 1)

OPINION:

Appeal dismissed without costs, by the Court *sua sponte*, upon the ground that no substantial constitutional question is directly involved.

Appendix C—Opinion of the New York Supreme Court, Appellate Division, Third Department, as Officially Reported in 174 A.D.2d 279.

In the Matter of SIERRA TELCOM SERVICES, INC., Petitioner, v THOMAS F. HARTNETT, as Commissioner of Labor, et al., Respondents. (Proceeding No. 1.)

In the Matter of ERICSSON BUSINESS COMMUNICATIONS, INC., Petitioner, v THOMAS F. HARTNETT, as Commissioner of Labor, et al., Respondents. (Proceeding No. 2.)

Third Department, January 30, 1992

SUMMARY

ORIGINAL PROCEEDINGS pursuant to CPLR article 78, commenced in the Appellate Division of the Supreme Court in the Third Judicial Department, to review a determination of respondent Commissioner of Labor, which found that petitioner Sierra Telcom Services, Inc. willfully failed to pay prevailing wages and supplements on a public work project, imposed a 10% civil penalty on said petitioner, and ordered that petitioner Ericsson Business Communications, Inc. be responsible for all noncompliance by petitioner Sierra of the Commissioner's order to tender a sum representing underpayments of wages and supplements, interest and penalty.

HEADNOTES

Labor — Prevailing Rate of Wages — Substantial Evidence — Local Collective Bargaining Agreement

1. In a proceeding to review a determination of the Commissioner of Labor finding that petitioner subcontractor willfully failed to pay prevailing wages and supplements on a public work project and imposing a 10% civil penalty, petitioner's contention that the determination was not supported by substantial evidence is without merit since classification of trades or occupations is a matter within the expertise of the Department of Labor and petitioner has failed to show that the Commissioner's classifications did not reflect the nature of the work actually performed. The proof at petitioner's hearing established that petitioner's work involved solely the installation of a telecommunications system, and in arriving at the determination that the majority of petitioner's workers should be classified as "electrician/telephone installers", it was permissible for the Commissioner to look at the local collective bargaining agreement between the electricians' union and the contractors' association to establish the job duties of the classification. In light of the breadth of the classification in the agreement, the Commissioner could properly conclude that in spite of the Department's inability to determine the specific job duties of each of petitioner's workers, each worker was entitled to receive at least the wage rate for the lowest of the four rates specified in the collective bargaining agreement.

Labor — Prevailing Rate of Wages — Classification of Workers — Particularity

2. In a proceeding to review a determination of the Commissioner of

Labor finding that petitioner subcontractor willfully failed to pay prevailing wages and supplements on a public work project and imposing a 10% civil penalty, petitioner's claims that the public employer failed to classify the workers to be employed on the project or to provide a description of the work to be performed as required by Labor Law § 220 (3-a) (a) is without merit since the "request for proposal" which the employer sent to bidders on the project described in sufficient detail the project's requirements, operational tests and performance and maintenance.

Labor — Prevailing Rate of Wages — Initiation of Investigation at Behest of Competitor

3. In a proceeding to review a determination of the Commissioner of Labor finding that petitioner subcontractor willfully failed to pay prevailing wages and supplements on a public work project and imposing a 10% civil penalty, petitioner's assertion that the investigation conducted by the Department of Labor was unlawful because it was initiated as the result of a complaint by one of petitioner's competitors is unavailing since Labor Law § 220 (7) permits the Commissioner to cause a compliance investigation to be made "on his own initiative", and the record indicates that the instant investigation, while prompted by a letter from an unsuccessful bidder, was initiated by the Director of the Bureau of Public Work, a designee of the Commissioner.

Labor — Prevailing Rate of Wages — Refusal to Issue Subpoena Requested by Subcontractor

4. In a proceeding to review a determination of the Commissioner of Labor finding that petitioner subcontractor willfully failed to pay prevailing wages and supplements on a public work project and imposing a 10% civil penalty, the refusal of the Administrative Hearing Officer to issue a subpoena duces tecum requested by petitioner does not warrant annulment of the determination since the Department of Labor turned over to petitioner its complete file containing all information relevant to the compliance investigation and the Department procedure manual which, although not initially made available to petitioner, was later produced upon request. The balance of the information sought by petitioner was not a part of the Department's file and was not relevant to the issues to be determined at the hearing.

Labor — Prevailing Rate of Wages — Use of Local Collective Bargaining Agreement

5. In a proceeding to review a determination of the Commissioner of Labor finding that petitioner subcontractor willfully failed to pay prevailing wages and supplements on a public work project and imposing a 10% civil penalty, petitioner's contention that the adoption by the Department of Labor of the wage rates set forth in the local collective bargaining agreement between the relevant labor union and contractors' association represented an unconstitutional delegation of power is unpersuasive, since the statutory requirements of Labor Law § 220 (5) that the employer under the collective bargaining agreement employ at least 30% of the workers engaged in the same trade or occupation in the locality before the wage provisions of the agreement may be used, provide sufficient standards so as to overcome any constitutional objection based upon delegation of legislative power to private parties.

Labor — Prevailing Rate of Wages — Willful Violation

6. In a proceeding to review a determination of the Commissioner of

Labor finding that petitioner subcontractor willfully failed to pay prevailing wages and supplements on a public work project, petitioner's contention that the failure of a representative of the Department of Labor to give it prompt written notice of violation in accordance with the Department's procedure manual precludes a finding that petitioner knowingly or intentionally violated the prevailing wage requirements, is without merit since there was ample record proof that the representative orally advised both petitioner and the general contractor on more than one occasion of the prevailing wage violations and the correct wages to be paid. Petitioner's contention that, as an out-of-State contractor, it had no reason to know of the prevailing wage requirements is belied by its subcontract, which made express reference thereto. Accordingly, inasmuch as petitioner continued to adhere to its payment practices after being notified that they violated Labor Law § 220, the finding of willfulness should not be disturbed. Moreover, the imposition of a 10% penalty *(see,* Labor Law § 220 [8]) was neither arbitrary nor capricious.

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By the Publisher's Editorial Staff

Am Jur 2d, Public Works and Contracts, §§ 199, 204, 208, 211-213, 215.

CLS, Labor Law § 220 (3-a) (a); (5), (7), (8).

NY Jur 2d, Public Works and Contracts, §§ 90, 91, 93-95, 97, 99.

ANNOTATION REFERENCE

See Index to Annotations under Public Works and Contracts.

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Gibson, Dunn & Crutcher (Jonathan L. Sulds of counsel), for Ericsson Business Communications, Inc., petitioner.

Robert Abrams, Attorney-General (M. Patricia Smith and *Jane Lauer Barker* of counsel), for respondents.

OPINION OF THE COURT

Levine, J.

In May 1988, petitioner in proceeding No. 2, Ericsson Business Communications, Inc. (hereinafter Ericsson), entered into a contract with the State University of New York at New Paltz (hereinafter SUNY) in which it agreed to install a telecommunications system on the SUNY campus in the Town

of New Paltz, Ulster County. In June 1988, Ericsson subcontracted certain work on the project to petitioner in proceeding No. 1, Sierra Telcom Services, Inc. (hereinafter Sierra). The contract specifications included a prevailing wage schedule previously requested by SUNY, which described the project as "[i]nstallation of [t]elecommunications [s]ystem".

In July 1988, in response to correspondence from an unsuccessful subcontract bidder on the SUNY project, respondent Department of Labor commenced an investigation of Sierra's compliance with the prevailing wage requirements of Labor Law § 220 (3). On August 1, 1988, Kevin Jones, an investigator from the Department's Bureau of Public Work, visited the site and spoke with Sierra's project manager, Brent Wright, and eight Sierra employees. At that time, Wright informed Jones that he was paying the groundman wage rate under the electrician-lineman classification on the prevailing wage schedule then in effect* and that many workers were receiving apprentice wages. All of the Sierra employees with whom Jones spoke told him that their work involved some aspect of telephone system installation.

On August 19, 1988, Jones returned to the project site and advised Wright that Sierra was required to pay its employees the electrician rate under prevailing wage schedule 5b, because it was the only rate that covered telephone installation work in the locality. Jones also informed Wright that Sierra could not pay its employees as apprentices unless they were registered as such with the Department. A few months later at a meeting with Ericsson's job superintendent, Jones pointed out the applicable rate for telephone installers under the new prevailing wage schedule 6a. Sierra continued its payment practices up until the time of project completion in February 1989. The Department concluded its investigation in May 1990 with a finding that Sierra had underpaid 81 of its employees wages and/or wage supplements totaling nearly $400,000.

Following a hearing held in October 1990, the Administrative Hearing Officer (hereinafter AHO) determined, *inter alia*,

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* There were two different prevailing wage schedules in effect during the SUNY project. Schedule 5b, which was applicable through June 1988 (the first four weeks of the project), was promulgated based on the collective bargaining agreement of IBEW Local 806 in the Village of Ellenville, Ulster County. That union was subsequently taken over by IBEW Local 631 in the City of Newburgh, Orange County, and schedule 6a was promulgated based on a new collective bargaining agreement, the Telephone Interconnect Agreement.

that Sierra had underpaid 81 of its employees in willful violation of Labor Law § 220 (3). Ericsson, as prime contractor, was found to be financially responsible for the underpayments, interest and the 10% civil penalty assessed against Sierra *(see,* Labor Law § 223). Respondent Commissioner of Labor essentially adopted the AHO's report and recommendations and calculated the total amount of underpayments, plus interest and penalty, to be $559,655.74. Petitioners then commenced these two separate CPLR article 78 proceedings in this court pursuant to Labor Law §§ 220 and 220-b seeking to annul the Commissioner's determination.

[1] Petitioners' principal contention in these proceedings is that the Commissioner's determination regarding the classification of and wage rates for Sierra's employees was not supported by substantial evidence. We disagree. Classification of trades or occupations is a matter within the expertise of the Department and determinations with respect thereto should not be disturbed in the absence of a clear showing that a classification does not reflect " 'the nature of the work actually performed' " *(Matter of General Elec. Co. v New York State Dept. of Labor,* 154 AD2d 117, 120, *affd* 76 NY2d 946, quoting *Matter of Kelly v Beame,* 15 NY2d 103, 109). Here, no such showing was made. We note initially that the proof adduced at the hearing amply established that Sierra's work on the project involved solely the installation of a telecommunications system. The Commissioner determined that the proper classification for the majority of workers employed on that project was electrician/telephone installer under schedule 5b and telephone installer under schedule 6a.

In arriving at this determination, it was clearly permissible for the Commissioner to look to the Telephone Interconnect Agreement, the local collective bargaining agreement between IBEW Local 631 and the Newburgh Division of the Eastern New York State Chapter of the National Electrical Contractors Association Inc., to establish the job duties of the classification *(see, Matter of Naftilos Painting & Sandblasting v Hartnett,* 173 AD2d 964, 966). That agreement, by its own terms, covers:

"[A] All erection, installation, maintenance, repair and service work of Telephone Interconnect Communication systems, devices, and cables including Private Branch Exchanges (PBX-PABX), Key Equipment and associated devices * * *

"[B] * * * all power and lighting construction work per-

formed in conjunction with the work referred to in (A) above including conduit, wire, power panels, emergency power, batteries, buss, motor generators and all directly related work which becomes an integral part of the power system."

Furthermore, Jones, who reviewed the above-described agreement and discussed the matter with the union's business agent, testified that telephone installation embraced "[e]verything from unloading the trucks when they get there to cleaning it up at the end". Under the collective bargaining agreement, all workers doing telecommunications work in the locality were to be paid one of four telephone technician wage rates. Thus, the Commissioner could properly conclude that, despite the Department's inability to determine the specific job duties of each Sierra worker, all 81 workers were entitled to receive, at a minimum, the wage rate for telephone installer, the lowest of the four rates. Despite petitioners' assertion to the contrary, the electrician-lineman classification used by Sierra did not cover telecommunications installation in Ulster County.

[2] Next, we reject petitioners' claim that the Commissioner's determination was affected by various errors of law. Petitioners argue first that SUNY failed to classify the workers to be employed on the project or to provide a description of the work to be performed as required by Labor Law § 220 (3-a) (a). SUNY's "request for proposal", however, which was sent to bidders on the project, described the project's system and cable requirements, operational tests and performance and maintenance. In our view, this document specified the work in sufficient detail to constitute compliance with the statute *(see, Matter of General Elec. Co. v New York State Dept. of Labor, supra).*

[3] Equally unavailing is petitioners' assertion that the Department's investigation was unlawful because it was initiated as the result of a complaint by one of Sierra's competitors. Labor Law § 220 (7) permits the fiscal officer, the Commissioner here, to cause a compliance investigation to be made "on his own initiative". The record indicates that the investigation in this case, while prompted by a letter from an unsuccessful bidder, was initiated by the Director of the Bureau of Public Work, a designee of the Commissioner. Under these circumstances, we cannot conclude that the investigation was unlawful.

[4] Nor can we conclude that the AHO's refusal to issue the

subpoena duces tecum requested by petitioners warrants annulment of the Commissioner's determination. It is undisputed that the Department turned over to petitioners its complete file containing all information relevant to the compliance investigation and the Department procedure manual which, although not initially made available to petitioners, was later produced upon their request. The balance of the information sought by petitioners was not a part of the Department's file and we agree with the AHO that such information was not relevant to the issues to be determined at the hearing *(cf., Matter of Hull-Hazard, Inc. v Roberts,* 120 AD2d 979, 979-980).

[5] We turn next to Sierra's contention that the Department's adoption of the wage rates set forth in the local collective bargaining agreement represented an unconstitutional delegation of power. This claim is unpersuasive. The statutory requirements of Labor Law § 220 (5) that the employer under the collective bargaining agreement employ at least 30% of the workers engaged in the same trade or occupation in the locality provide sufficient standards, before the wage provisions of the agreement may be used, so as to overcome any constitutional objection based upon delegation of legislative power to private parties *(see, Matter of General Elec. Co. v New York State Dept. of Labor,* 154 AD2d 117, 121, *supra).* We do not read the case relied on by Sierra, *General Elec. Co. v New York State Dept. of Labor* (936 F2d 1448), to require a contrary conclusion. In that case, the collective bargaining agreement utilized by the Department in establishing a prevailing wage rate contained two separate wage rates and a provision explicitly barring application of the lower wage rate to public work projects. The Second Circuit held that if it could be demonstrated that the two-tier wage system was collusively negotiated and then simply adopted by the Department without the exercise of any discretion, an unconstitutional application of Labor Law § 220 would be established *(see, supra,* at 1459). Because the facts of this case are clearly distinguishable from *General Elec.,* Sierra's reliance thereon is misplaced.

[6] The only other issue requiring discussion concerns Sierra's challenge to the Commissioner's determination that its violation of Labor Law § 220 was willful. In support of this argument, Sierra claims that Jones' failure to give it prompt written notice of violation in accordance with the Department's procedure manual precludes a finding that it know-

ingly or intentionally violated the prevailing wage requirements. We disagree. There was ample proof in the record that Jones orally advised representatives from both Sierra and Ericsson on more than one occasion of the prevailing wage violations and the correct wages to be paid. Sierra's contention that, as an out-of-State contractor, it had no reason to know of the prevailing wage requirements is belied by its subcontract with Ericsson which makes express reference thereto. Because Sierra continued to adhere to its payment practices after being notified that they were violative of Labor Law § 220, the finding of willfulness should not be disturbed *(see, Matter of Tap Elec. Contr. Serv. v Hartnett,* 76 NY2d 164, 170-171). As a final matter, we cannot agree with Sierra that the Commissioner's imposition of a 10% penalty *(see,* Labor Law § 220 [8]) was arbitrary or capricious.

We have examined petitioners' remaining contentions and find that they are either not properly before us, because they were not raised at the administrative level *(see, Matter of Bridgestone/Firestone, Inc. v Hartnett,* 175 AD2d 495, 498), or lacking in merit.

MERCURE, CREW III, MAHONEY and CASEY, JJ., concur.

Adjudged that the determination is confirmed, without costs, and petitions dismissed.

Appendix D—Order and Determination of the New York State Commissioner of Labor.

ORDER AND DETERMINATION, MARCH 29, 1991

STATE OF NEW YORK

DEPARTMENT OF LABOR

IN THE MATTER

OF

ERICSSON BUSINESS COMMUNICATIONS, INC.

Prime Contractor

SIERRA TELECOM SERVICES, INC.

Subcontractor

for the determination, pursuant to Article 8 of the Labor Law, whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project consisting of installation of a telephone system at the State University of New York at New Paltz.

Prevailing Rate
Case No. 86-4039

This is a proceeding conducted pursuant to Section 220 of Article 8 of the Labor Law to determine whether the pre-

vailing rate of wages and supplements required by statute to be paid or provided to laborers, workers and mechanics employed on a public work project were paid to or provided for certain employees of Sierra Telecom Services, Inc. (Sierra), a subcontractor of Ericsson Business Communication, Inc. (Ericsson), a party to a contract awarded by the State University of New York (SUNY) for a public work project consisting of the installation of a telephone system at SUNY New Paltz, in New Paltz, New York.

On reading the Report and Recommendation of the Hearing Officer, the transcript of the hearing held October 3 and 4, 1990, and reviewing the evidence in the record, and due deliberation having been had,

NOW, on the entire record of this matter, it is:

DETERMINED that I hereby adopt the Report and Recommendation of the Hearing Officer subject to the following corrections of typographical errors:

Claimant Daniel L. Aldrich was underpaid $980.18, not $1,381.53; claimant Christopher A. Crews was underpaid $5,724.51, not $3,563.03; claimant Walter Delgado was underpaid $9,968.48 not $9,768.48; claimant Kelly M. Swift was underpaid $5,296.62, not $5,196.62; which corrections result in a total underpayment of $389,512.69 (DOL Ex. #20); and it is

DETERMINED that Sierra willfully failed to pay the prevailing rate of wages and provide supplements to eighty-one (81) employees in accordance with Article 8 of the Labor Law which provides that when final determinations have been rendered against a contractor or subcontractor and/or its successor in two instances within any consecutive six-

year period determining that such contractor or subcontractor and/or its successor has willfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, such contractor or subcontractor and/or its successor shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the second final determination. For the purposes of this Article, a successor shall mean an employer engaged in work substantially similar to that of the predecessor, where there is substantial continuity of operation with that of the predecessor;

ORDERED that Sierra shall pay interest on the underpayments in the amount of sixteen (16) percent per annum from the date of the underpayment to the date of payment such amount to be as follows:[1]

Employee	Underpayment of Wages and Supplements	Interest	Total
Daniel L. Aldrich	$ 980.18	$ 331.66	$ 1,311.84
Jeffrey Aschenbrenner	10,225.00	3,459.80	13,684.80
William Bannon	626.21	211.88	838.09
Juan Barrios	1,413.96	478.43	1,892.39
Merle E. Belcher	3,729.50	1,261.94	4,991.44
Steve Benton	2,773.69	938.52	3,712.21
Patrick Berube	13,302.11	4,501.00	17,803.11
Brian Blazick	7,578.05	2,564.16	10,142.21
Jeffrey Blazick	14,760.22	4,994.38	19,754.60
Jeffrey L. Booker	227.85	77.09	304.94

[1]Note that the actual amount of money received by the named claimants may be less than the totals shown because of federal and state tax withholding law requirements.

Keith H. Boynton	1,756.11	594.21	2,350.32
Steve Burgmeyer	1,933.35	654.18	2,587.53
Robert Byers	1,606.00	543.41	2,149.41
David Carlson	1,525.58	516.20	2,041.78
Curtis Casler	10,381.71	3,512.83	13,894.54
Christopher A. Crews	5,724.51	1,936.98	7,661.49
Doyle W. Daffern	1,486.00	502.81	1,988.81
Paul Daffern	1,486.00	502.81	1,988.81
Gary Dallis	1,073.18	363.12	1,436.30
Walter Delgado	9,968.48	3,373.01	13,341.49
Robert Furhman	9,419.77	3,187.34	12,607.11
Edward A. Galloway	1,144.72	387.33	1,532.05
Talmadge Harris	65.10	22.02	87.12
Markel D. Harrison	1,524.36	515.79	2,040.15
Edward M. Hayes	1,980.35	670.08	2,650.43
Kenneth S. Henry	7,316.81	2,475.77	9,792.58
Mark A. Hofsdal	3,885.52	1,314.73	5,200.25
Melissa Howard	9,886.16	3,345.15	13,231.31
Calvin Johnson	647.05	218.94	865.99
Peggy Katra	5,644.82	1,910.02	7,554.84
Kirk Kingley	5,466.17	1,849.57	7,315.74
Kern Kline	13,000.17	4,398.83	17,399.00
Terry Livengood	801.06	271.05	1,072.11
George Lober	7,551.95	2,555.33	10,107.28
Leroy Looman	5,766.56	1,951.21	7,717.77
Martin Ludwick	2,786.80	942.96	3,729.76
Andrew Mahoney	1,561.16	528.24	2,089.40
Theodore Marchese	2,089.37	706.97	2,796.34
Malcolm MacNab	3,214.32	1,087.62	4,301.94
Dale Mertine	6,124.67	2,072.38	8,197.05
James McRoberts	9,917.96	3,355.91	13,273.87
John McQuiston	16,202.90	5,482.53	21,685.43
Michael J. Moran	2,066.83	699.34	2,766.17
Donald Morse	7,482.36	2,531.78	10,014.14
Walter K. Morse	2,293.76	776.13	3,069.89
Jeffrey Moss	442.14	149.60	591.74

Kenneth J. Murray	2,167.31	733.36	2,900.73
Mark Newman	1,933.35	654.18	2,587.53
Michael J. O'Brien	6,281.80	2,125.55	8,407.35
Raul Orve	384.08	129.96	514.04
Richard Patchin	2,638.34	892.72	3,531.06
William Patchin, Sr.	6,334.74	2,143.47	8,478.21
William Patchin, Jr.	5,085.94	1,720.91	6,806.85
Jorge Perez	113.39	38.36	151.75
Robert J. Piron	3,568.79	1,207.56	4,776.35
Thomas A. Ricker	4,716.21	1,595.81	6,312.02
James Riggs	1,211.60	409.96	1,621.56
Milton Robertson	9,440.69	3,194.42	12,635.11
Rocco Ruggieri	1,416.77	479.38	1,896.15
Lyle Rose	1,503.83	508.84	2,012.67
Michael J. Rostanzo	8,041.82	2,721.09	10,762.91
Christopher D. Shepherd	5,230.22	1,769.73	6,999.95
Rose M. Shepherd	3,899.59	1,319.49	5,219.08
Ronald Sherwood	12,575.03	4,254.98	16,830.01
Samuel Snyder	9,060.40	3,065.74	12,126.14
Gary Strickland	2,218.65	750.71	2,969.36
Kelly M. Swift	5,296.62	1,792.20	7,088.82
Donald Tindall	251.75	85.18	336.93
Kevin Thomas	1,204.40	407.52	1,611.92
Fred Toscano	511.05	172.92	683.97
Herman J. Toscano	483.87	163.72	647.59
Carlos Vasquez	8,840.39	2,991.30	11,831.69
Albert Venezia	10,647.10	3,602.63	14,249.73
Leo Villegas	147.85	50.02	197.87
Jeffrey Walls	11,031.99	3,732.86	14,764.85
Brent D. Warner	5,813.77	1,967.19	7,780.96
Brian Lee Warner	12,487.41	4,225.33	16,712.74
Randy Weiher	12,919.26	4,371.45	17,290.71
Ronald Witzel	10,919.19	3,694.70	14,613.89
Jauier Zarte	101.86	34.46	136.32
David Katra	193.04	65.31	258.35
TOTAL	$389,512.69	$131,798.05	$521,310.74

ORDERED that the Commissioner of Labor will impose a civil penalty of $38,345.00, or approximately ten (10) percent of the underpaid wages and supplements.

ORDERED that, pursuant to Labor Law Section 223, Ericsson, as prime contractor, shall be responsible for all non-compliance or evasion of Article 8 by Sierra, including any underpayments of wages and supplements, interest and penalty;

ORDERED that the Office of the State Comptroller shall issue a certified check payable to the Commissioner of Labor, in the amount of $559,655.74 which amount is the sum of the underpayments, interest and penalty, and forward such check to the New York State Department of Labor, Bureau of Public Work, Building #12, State Campus, Room 136, Albany, New York 12240 for distribution to the respective payees.

Dated: March 29, 1991
Albany, New York

THOMAS F. HARTNETT
Commissioner of Labor

NOTICE OF FILING, MARCH 29, 1991

STATE OF NEW YORK

DEPARTMENT OF LABOR

IN THE MATTER

OF

ERICSSON BUSINESS COMMUNICATIONS, INC.

Prime Contractor

SIERRA TELECOM SERVICES, INC.

Subcontractor

for the determination, pursuant to Article 8 of the Labor Law, whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project consisting of installation of a telephone System at the State University of New York at New Paltz.

Prevailing Rate
Case No. 86-4039

PLEASE TAKE NOTICE that annexed hereto is a true copy of an Order and Determination of the Commissioner of Labor which was duly filed in the Office of the Commissioner of Labor on March 29, 1991.

Any party aggrieved by this Order and Determination may commence a proceeding for the review thereof pursuant to Article 78 of the Civil Practice Laws and Rules within thirty days from the Notice of Filing of the said Order and Determination in the office of the Commissioner of Labor.

Any appeal from this Order and Determination shall be made directly to the Appellate Division of the Supreme Court.

Pursuant to the State Administrative Procedure Act, Section 307.3(a), the above-captioned case is indexed as follows:

SUBJECT: 1) Public Work;

2) Underpayments by Sierra Telecom Services, Inc., in the amount of $389,512.69 to eighty-one (81) employees;

3) Willful violation;

4) 16% interest;

5) 10% civil penalty.

Dated: March 29, 1991
Albany, New York

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REPORT AND RECOMMENDATION, MARCH 19, 1991

STATE OF NEW YORK

DEPARTMENT OF LABOR

IN THE MATTER

OF

ERICSSON BUSINESS COMMUNICATIONS, INC.

Prime Contractor

SIERRA TELECOM SERVICES, INC.

Subcontractor

for the determination, pursuant to Article 8 of the Labor Law, whether prevailing wages and supplements were paid to or provided for the laborers, workers and mechanics employed on a public work project consisting of installation of a telephone system at the State University of New York at New Paltz.

Prevailing Rate
Case No. 86-4039

TO: Honorable Thomas F. Hartnett, Commissioner of Labor,
New York State Department of Labor

Pursuant to a Notice of Hearing in this matter, and in accordance with Article 8 of the Labor Law, I held a hearing

on October 4th and 5th, 1990 at the offices of the Department of Labor, State Office Building Campus, Albany, New York.

The purpose of this hearing was to inquire into and make Findings of Fact, Conclusions of Law and Recommendations with respect to issues raised by the investigation made by the Bureau of Public Work (Bureau) of the New York State Department of Labor in regard to payment of prevailing wages and supplements to, or on behalf of, public work employees employed by Sierra Telecom Systems, Incorporated (Sierra), sub-contractor to Ericsson Business Communications, Incorporated (Ericsson), contractor on a public work contract (Contract) with the State University of New York (SUNY) for the installation of a telephone system at SUNY, New Paltz, New York.

APPEARANCES

The Department was represented by Barbara Deinhardt, Deputy Commissioner of Labor for Legal Affairs, Jerome A. Tracy, of counsel.

Gibson, Dunn and Crutcher, Jonathan L. Sulds, Esq., of counsel, represented the contractor Ericsson.

Couch, White, Brenner, Howard and Feigenbaum, Leslie F. Couch, Esq., of counsel, represented the sub-contractor Sierra.

Kevin E. Jones (Jones), Senior Public work Wage Investigator appeared as a witness for the Department.

No witnesses appeared for either Ericsson or Sierra.

The Department's contention, through testimony from its witness Jones and documents entered into evidence during the hearing, is that Sierra underpaid eighty-one (81) employees on this contract. Further, it stated Sierra misclassified these employees by paying the lowest rate on the

prevailing wage schedule in addition to paying many employees apprentice rates, although Sierra did not have a New York State Apprenticeship Program.

The respondents, Ericsson and Sierra, through cross-examination of Jones, the witness, and documents entered is that the Department has failed to prove any of the charges in the Notice of Hearing, made several motions to quash the hearing and dismiss the charges.

FINDINGS OF FACT

On June 17, 1986, the Bureau received a Request for Wage and Supplement Information (Request) from SUNY for work to be performed on a public work project (Project) (DOL Ex. #3). The Request described the nature of the work to be performed on the Project as "installation of Telecommunications System" and occupations involved as "cable and equipment installation" (DOL Ex. #3). In response to the Request, the Department issued Prevailing Wage Rate Schedule 3E to SUNY (DOL Ex. #4). Subsequently, the Department issued annually determined wage schedules on three (3) occasions, including April 12, 1988 (Schedule 5B) and June 30, 1988 (Schedule 6A) (DOL Ex. #7, #9).

On or about May 19, 1988, SUNY and Ericsson entered into a contract for installation of a telephone system at SUNY's College at New Paltz (DOL Ex. #10, #12). On or about June 6, 1988 and June 20, 1988, Ericsson entered into subcontracts with Sierra for work on the Project (DOL Ex. #13).

The Bureau initiated an investigation into the project and assigned Jones as the investigator. This investigation was started as a result of a written complaint from a representative of Compu-Net, an unsuccessful sub-contractor, who bid on the project (Tr. p. 38; R. Ex.

Jones visited the Project site on August 1, 1988, and met with Brent Wright (Wright), Superintendent of Sierra (Tr. p. 38; DOL Ex. #2). Wright provided space in Sierra's trailer whereby Jones proceeded to interview eight (8) employees of Sierra (Tr. p. 39; DOL Ex. #2).

Jones stated that all eight (8) employees generally told him they were doing "some type of work that was involved in the installation of the telecommunications system; whether it was pulling wires or putting in conduits".

Jones also asked each employee how much pay they received, whether they had a lunch break and what type of work they were performing (Tr. pp. 39, 40; DOL Ex. #2).

During the same August 1, 1988 visit, Jones issued a PW-28, Notice of Labor Law Violation, citing several non-wage violations of §220 (Tr. pp. 40, 41; DOL Ex. # 14). At a subsequent visit on August 19, 1988, Jones reissued a PW-28 noting the non-wage violations he issued on 8/1/88 had been complied with (Tr. pp. 41, 42; DOL Ex. #15).

On the August 19, 1988 visit, Jones testified that Wright provided him with payrolls for the project which he made copies of and returned the originals (Tr. pp. 40, 42). During this meeting, Jones testified at some length of his conversation with Wright regarding the wages Sierra was paying employees on the project (Tr. p. 46).

Jones stated that Wright indicated that many of the employees were paid the Electrician, Groundman rate for the work. Further, Wright indicated that many employees were inexperienced and out of Tech schools, so Wright used the first-year apprentice rate, and applied it to the first year Ground rate to pay many of the employees (Tr. pp. 46, 48; DOL Ex. #13).

Jones asked Wright if the employees he was paying the apprentice rates were registered in a New York State Ap-

prenticeship Program. Wright responded that they were not. Jones advised Wright that unless the employees are registered under a New York State Apprenticeship Program they are not considered apprentices by the Bureau (Tr. pp. 48-50, 212, 213).

The College at New Paltz' Request for Proposal Volume #1 (DOL Ex. #12) details very specifically the requirement that no employee shall be deemed an apprentice unless they are registered in a bona-fide New York State Apprenticeship Program. Any employee who is not so registered shall be paid the journeyman classification for work performed (DOL Ex. #12; pp. 137, 139, 142). These exact requirements were also included in the sub-contract agreement between Ericsson and Sierra (DOL Ex. #13).

Jones stated he advised Wright that the lineman rate was incorrect and that Sierra must pay the Electrician rate (Tr. pp. 54). Jones did not issue a PW-28 Notice of Violation of this rate, nor did he note this conversation in his PW-29 Daily Contact Log (DOL Ex. #2; Tr. pp. 150-152, 164, 165).

On November 17, 1988, Jones stated he requested additional up-to-date payrolls from Wright and also that he discussed the new Prevailing Rate Schedule 6A with Ericsson Strasson, a representative of Ericsson regarding a new union jurisdiction for the work covered on the project, specifically Local #631 from Newburg (Tr. pp. 55-57; DOL Ex. 12, 13, 19).

On December 12, 1988, Jones and his supervisor, Fred Morlock, met with representatives from Sierra at a diner in New Paltz. Sierra representatives stated they were not aware of any problem with underpayments on the project until a few weeks earlier, and claimed Wright was in charge and responsible for all payments (Tr. pp. 57-59).

Jones met with John McQuiston on February 9, 1989 in Ellenville and completed a complaint form that Mr. Mc-

Quiston signed (Tr. pp. 75, 76; DOL Ex. #17). On February 16, 1989, Jones met with McQuiston, along with two (2) other Sierra employees O'Brien and Blazick. O'Brien and Blazick completed complaint forms which also included some entries by Jones. Each complaint form was signed by the individual making the complaint (Tr. pp. 76-78; DOL Ex. 17, 18, 19).

Based upon the information provided by these three (3) individuals (McQuiston, O'Brien and Blazick), and utilizing the Prevailing Wage Rate, Jones classified these three (3) individuals as receiving an hourly rate higher than the other employees of Sierra (DOL Ex. #11, 12, 13, 17, 18, 19, 20; Tr. pp. 87-90).

Jones determined that eighty-one (81) employees worked on the project for Sierra based upon Sierra's records (DOL Ex. #20, 25). Except for the three (3) workers discussed above (McQuiston, O'Brien and Blazick), Jones, based upon his experience, interviews he held with eight (8) other employees, discussions with Wright of Sierra, contract documents including the prevailing wage schedules 5b and 6a, discussions with union representatives and Jones' supervisor, he determined that the appropriate classification for the majority of workers on the job was Electrician/ Telephone Installer in Schedule 5B and Telephone Installer and Telephone Technician in Schedule 6A (DOL Ex. #2; Tr. pp. 64-66, 90, 91, 206 207).

Schecule 5B and Schedule 6A included the following prevailing hourly rate of wages and hourly supplement equivalents for work performed on the Project for the following occupations (DOL Ex. 11, 12, 13):

Occupation	Schedule 5B		Schedule 6A	
	Wages	Supplements	Wages	Supplements
Electrician	$16.20	$6.56		
PBX Installer			$19.25	$3.81
Telephone Technician			$18.46	$3.76
Telephone Installer			$16.25	$3.60

Jones described in detail how he utilized the assistance of an additional investigator Orvis Vinotto (Vinotto) from the Binghamton office to assist in the tedious task of conducting the audit, which consisted of reviewing the payroll records provided by Sierra and comparing the wages and supplements paid the employees against the Prevailing Wage Schedule and classification that Jones determined applied including wages for premium overtime work by Sierra's employees (DOL Ex. #11, 20, 25; Tr. pp. 78, 79).

Jones explained in detail just how the summary of underpayment was arrived at in which he personally reviewed the alleged underpayment arrived at by Vinotto for each employee (DOL #20, 25; Tr. pp. 79-87). For the three (3) employees that Jones personally interviewed (McQuirk, O'Brien and Blazick), Jones completed the PW-11's (Summary of Underpayment) utilizing the procedure he outlined in his testimony (DOL Ex. #20, 25; Tr. pp. 87-89).

Jones testified that while the Prevailing Rate Schedule 6A and 5B include a percentage of wages per hour for supplements, he computed the amount of money earned per the hour and took the appropriate percentage of that amount earned to compute the alleged underpayment. When the employees worked overtime, Jones used the amount of pay they earned per overtime hour to compute the underpayment (DOL Ex. #11, 12, 13, 20, 25; Tr. pp. 84, 85, 139-141).

Jones stated that in Schedule 6A there were four (4) different classifications of telephone installers, and since he

was not given specific information on the actual work performed by the employees on the project, he applied the lowest rate ($16.25) of the four (4) classifications in computing the alleged underpayments (DOL Ex. #11; Tr. pp. 138, 220). He further stated that, other than the payrolls, to the best of his knowledge neither he nor anyone in his office received any communication from Sierra explaining what individual employees did on the project (Tr. pp. 137, 138, 217-223).

Based upon the audit conducted by both Vinotto and Jones, the Bureau alleges that eighty-one (81) employees of Sierra were underpaid prevailing wages, supplements and overtime premium wages and supplements totaling three hundred eighty-seven thousand, four hundred fifty-two dollars and fifty cents ($387,452.50) (DOL Ex. #20).

Counsel for both respondent Ericsson and Sierra made a motion several times at the beginning, during and at the end of the hearing to dismiss all charges based on several issues which they claim that the Department of Jurisdiction (SUNY) and the Department of Labor (Bureau) failed to properly follow as outlined in Article 8 (Tr. pp. 5-14, 94, 95, 231). The Hearing Officer advised both respondents that he does not have the authority to dismiss the charges in the hearing, but is charged by the Commissioner of Labor to make a report and recommendation to the Commissioner, who has the authority to make a final decision on the case (Tr. p. 86).

Both respondents also requested the Hearing Officer to issue a Subpoena "Duces Tecum" covering a wide range of information, documents, manuals and wage schedules. Mr. Tracy, counsel for the Department, stated that he had provided all information relevant to the proceeding in question, and after a review and discussion of the request, the Hearing

Officer determined that it was inappropriate to issue the subpoena (R. Ex. #2; Tr. pp. 14-22, 94-108).

Jones, by PW-28 Notice of Labor Law Inspection finding date (May 21, 1990), notified Sierra of the final underpayment due on the job (DOL Ex. #22; Tr. p. 91). The Summary of Underpayment (PW-11's) (DOL Ex. #20) were mailed to both Ericsson and Sierra, however, Jones did not recall the exact date as no covering letter was attached to the PW 11's. He did state they were not mailed any earlier than May 21, 1990, the date of the last PW-28 (DOL Ex. #22, 20; Tr. pp. 216-228).

Jones issued a Notice to the Department of jurisdiction to withhold payment on November 23, 1988 (DOL Ex. #23, Tr. p. 91).

CONCLUSIONS OF LAW

Article 8 of the Labor Law applies to the contract, as SUNY is a party to the Contract, which involved the employment of laborers, workers and mechanics on a public improvement contract as provided for in §220(2) of the New York State Labor Law.

The key issues to be decided are if Sierra underpaid approximately eighty-one (81) employees on this project due to paying the incorrect occupational classification from the appropriate prevailing wage schedules, also if Sierra underpaid its employees for premium overtime work performed on the contract, and if Sierra paid some employees the apprenticeship rate without having an approved apprenticeship program registered with the New York State Department of Labor.

The Bureau initiated the investigation as a result of a complaint by an unsuccessful bidder. The Director, through his supervisor, assigned Jones to the investigation. The Bureau's manual, which was provided to the respondents at

their request (R. #x. #14), specifically stated, in part, in its *Policy* (#4070 pg. 1) of the manual that the Bureau will conduct *continuing* inspections of public work projects. Additionally in Plan of Operation, it stated in part that Investigators will visit active projects indicated by "Prevailing Rate Schedule Transmittal Letter" (PW-200). Also §220.7 states in part that the fiscal officer or his agents, examiners and inspectors may examine records.

Article 8 of the Labor Law and various sections date back at least until April 5, 1936 (see §220.3c). The Article has had numerous amendments since that time.

The procedural manual specifically grants authority to the Bureau to investigate on-going public work projects. This investigation was not initiated just by an investigator's whim, but on the direction and judgment of the Director of the Bureau. Therefore, based upon the above facts,

I *FIND* that the Bureau was completely within its authority to commence and conduct its investigation of this project.

Jones, on behalf of the Department was the only witness, and gave extended testimony, together with exhibits entered into evidence, as to how he arrived at his decision to classify the employees on the project as he did utilizing the appropriate prevailing wage schedule. This involved interviews with eight (8) employees on the job site, three (3) additional employees at a later date, conversations with Wright, the project Superintendent for Sierra, discussions with other investigators, as well as his supervisor, Fred Morlock. He also contacted the Business Agent representing the unions which established these classifications and prevailing wage schedules by law (§220-5a, b, c). After a complete review of the facts, he determined that the classification of workers under Schedule 5B was Electrician/Telephone Installer and under Schedule 6A Telephone

Installer and Telephone Technician. Utilizing employee payrolls provided by Sierra, he directed an additional Investigator (Vinotto) to perform the mathematical tasks of computing the underpayments by using the occupational classification that Jones determined for the appropate prevailing wages and supplements from the wage schedule.

These computations also reflected premium overtime pay, as well as appropriate supplements, for all such work as provided for in the appropriate wage schedule.

The courts have consistently held that "work classification" is a function of Department of Labor's particular expertise (see *Matter of Georgakis Painters Corporation vs. Department of Labor* A D 3d 60662 February 7, 1991) ref. (*Matter of L & M Company v. State Department of Labor, A D 2d—May 17, 1990)* cf, Labor Law §220 (3-a)(a). The courts have further held that if the classification is supported by substantial evidence in the record, it is not to be disturbed (see *Matter of Hull-Hazard, Inc. v. Roberts,* 129 A D 2d 348, 352, affd. 72 NY2d 900). Jones utilized every means available to him to arrive at his determination of classification. The respondents failed to provide any shred of evidence or testimony during the proceeding to refute Jones's determination.

In the (*Matter of Nelson's Lamp Lighters, Inc. v. Roberts* AD 3d 54944 January 14. 1988), the court unanimously held that determining occupational classifications of work is the expertise of the Department of Labor.

Jones further testified that in discussing wages paid to employees on the project, Wright advised Jones that he paid three (3) employees out of tech school with no experience the first year apprenticeship rate for the first year Lineman-Groundman classification. Jones further stated that Wright advised him that Sierra did not have a bona-fide registered apprenticeship program with the New York State Depart-

ment of Labor. A review of Sierra's payrolls (DOL Ex. #25) reveals that numerous employees were paid wage rates equivalent to what an apprentice would be paid according to the appropriate wage classification for Lineman-Groundman

Labor Law §220(3) specifically states in part that "no employee shall be deemed an apprentice unless he is individually registered in an apprenticeship program duly registered with the Commissioner of Labor". This is further explained in the appropriate prevailing wage schedule very specifically, and in several areas of the contract document which Sierra was signatory to.

The courts have consistently found that §220 unambiguously authorizes only two (2) categories of employees, journeymen and apprentices, and the New York State Court of Appeals further strengthens these findings in that the source of funding, federal or state, for the project is irrelevant (see *Matter of Monarch Electrical Contracting Corp. v. Roberts* (70 NY2d 91), also (*Matter of Tap Electrical Contracting Service, Inc. v. Hartnett* NY Court of Appeals 2 141, June 5, 1990.)

The number of employees found to have been underpaid on the project by the Bureau was eighty-one (81). Jones interviewed a total of eleven (11) employees in addition to discussions with numerous other individuals as outlined above in making his determination of the classification of work. To have expected Jones to interview all eighty-one (81) individuals in the complete absence of any compelling reasons, complaints or information provided by the respondent, is totally unreasonable. The project documents (DOL Ex. #12, 13) were very specific as to the project requirements "installation of a telecommunication system". The request for a prevailing wage schedule by SUNY (DOL Ex. #3) specifically states the project involves the installation of

voice/data telecommunication system. It also describes the occupation for the project as "Cable and Equipment Installer" on the PW-39 #F. A further classification on this document in #F included the occupation of Lineman. This classification of Lineman was not checked or referenced by SUNY at all.

Jones testified that he advised Wright of the correct classification to be used on the project at his August 19, 1988 meeting, but forgot to record it on his Project Contact sheet. (DOL Ex. #13).

Although Jones may have been negligent in not strictly adhering to Bureau policy on this issue, this has little or no bearing against the overwhelming evidence requiring Sierra to pay the appropriate prevailing wages.

Labor Law §220(2) requires the wages to be paid and the supplements to be provided to laborers, workmen or mechanics working on a public work project to be not less than the prevailing rate of wages or supplements for the occupation in the locality where the work was performed.

Therefore, based upon all of the foregoing reasons,

I *FIND* that Sierra violated §220(3) by underpaying eighty-one (81) employees on this project the appropriate prevailing wages and supplements for the work they performed on the project. These underpayments include employees being paid as Lineman, which was the wrong classification, as well as paying apprentice wages without a bona fide New York State registered apprenticeship program.

I *FIND* that the underpayment, as computed by the Department and reflected on Attachment A totalling three hundred eighty-seven thousand, four hundred fifty-two dollars and fifty cents ($387,452.50) is the true and accurate underpayment owed by Sierra on the project.

Therefore, I *FIND* that the motion made by both respondents Ericcson and Sierra to dismiss all charges by the Department in this proceeding should be denied.

Labor Law §220-b(2) requires, for contracts entered into after January 1, 1986, the imposition of the rate of interest in effect as prescribed by the Superintendent of Banks pursuant to Banking Law §14-a-l. In view of this requirement of the Labor Law, the rate as provided in Banking Law §14-a-1 is sixteen per cent (16%). Therefore, based upon the aforementioned statute criteria,

I *FIND* that interest should be assessed at the rate of sixteen per cent (16%) per annum from the date of the underpayment until the underpayment is paid.

Labor Law §220-b(2) further states that a penalty not exceeding twenty-five per cent (25%) of the total due may be assessed. In assessing the amount of penalty, due consideration should be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and the failure to comply with recordkeeping or other non-wage requirements.

The facts disclose that Sierra violated multiple record-keeping requirements found in Article 8, it paid apprentice wages to non-apprentices, it did not begin paying the correct wages and supplements when informed by the Department that it underpaid all employees on the Project. In light of these facts, a civil penalty of ten per cent (10%) should be imposed.

Labor Law §223 states, in part, that when such evidence indicates a non-compliance or evasion on the part of a subcontractor, the contractor shall be responsible for such non-compliance or evasion. Therefore, based upon that statutory criteria,

I *FIND* that Ericsson, the Contractor on the project, is financially responsible for all underpayments, interest and penalties assessed against Sierra.

The last issue to be determined is whether or not the violation noted in this project should be considered as *willful* within the meaning of the law as prescribed by §220-b(3)(b), which provides that when two (2) final determinations are rendered against an employer in six (6) years determining that such employer willfully failed to pay prevailing wages and supplements, such employer is ineligible to bid on, or be awarded, a public work contract for a period of five (5) years from the second final determination.

The underpayments by Sierra are substantial and serious. Sierra not only misclassified employees on the project, but when advised by the Bureau, they continued to underpay the employees. Further, Sierra paid a substantial number of employees as apprentices in light of the fact that they did not have a bona-fide registered New York State Apprenticeship Program. This requirement was told to Sierra by Jones. Further, the contract document specifically spelled out this requirement in several detailed and lengthy explanations on the prevailing wage schedule.

Although Sierra claims this was the first prevailing wage job in New York State, this was a substantial job with a large number of employees, and Sierra knew, or should have known, of the requirement to pay appropriate prevaling wages, and failed to do so (see *Cam-Ful Industries v. Roberts,* 128 AD2d 1006).

Sierra, in paying numerous employees the apprentice rate of pay in the absence of an approved program, demonstrates a deliberate and intentional disregard of the Labor Law.

Therefore, based upon all of the foregoing facts listed here and in the record of this proceeding,

I *FIND* that the violations by Sierra on this project are *WILLFUL.*

RECOMMENDATIONS

I *RECOMMEND* that the Commissioner of Labor

DETERMINE that the eighty-one (81) employees listed on Attachment A were underpaid prevailing wages, supplements and overtime wages and supplements listed opposite each name totaling three hundred eighty-seven thousand, four hundred fifty-two dollars and fifty cents ($387,452.50).

ORDER that interest at the rate of sixteen per cent (16%) per annum be added to each of the above amounts from the date the monies were due until the date the monies are paid.

ORDER that a civil penalty of thirty-eight thousand, three hundred and forty-five dollars, representing approximately ten per cent (10%) of the underpaid wages, be assessed against Sierra.

DETERMINE that Sierra's failure to pay appropriate prevailing wages, supplements and overtime pay and supplements, in addition to paying apprentice wages without a bona fide New York State registered apprenticeship program, were all *willful* violations of Article 8 §220-b(3)(b) as outlined above.

DETERMINE that all underpayments by Sierra, including wages, supplements, interest and penalties assessed, are the financial responsibility of Ericsson as provided by §223.

ORDER that SUNY issue one (1) check for all of the monies due as outlined above from the funds being withheld on the project from Ericsson to the New York State Depart-

ment of Labor, Bureau of Public Work, State Office Building Campus, Albany, New York 12240 for distribution to payees. If any funds remain after this check is issued, they should be released to Ericsson, the contractor on this project.

Finally, I *RECOMMEND* that the Commissioner of Labor adopt my Findings of Fact and Conclusions of Law as being his determination of the issues raised by this hearing, and file such Order and Determination.

Dated: Utica, New York
March 19, 1991

Florio A. Vitullo
Hearing Officer

Ericsson Business Communications, Inc. (Prime)
Sierra Telecom Services, Inc. (Sub)
Prevailing Rate Case No. 86-4039

ATTACHMENT A

Employee	**Underpayment of Wages and Supplements**
Daniel L. Aldrich	$ 1,381.53
Jeffrey Aschenbrenner	10,225.00
William Bannon	626.21
Juan Barrios	1,413.96
Merle E. Belcher	3,729.50
Steve Benton	2,773.69
Patrick Berube	13,302.11

Brian Blazick	7,578.05
Jeffrey Blazick	14,760.22
Jeffrey L. Booker	227.85
Keith H. Boynton	1,756.11
Steve Burgmeyer	1,933.35
Robert Byers	1,606.00
David Carlson	1,525.58
Curtis Casler	10,381.71
Christopher A. Crews	3,563.03
Doyle W. Daffern	1,486.00
Paul Daffern	1,486.00
Gary Dallis	1,073.18
Walter Delgado	9,768.48
Robert Furhman	9,419.77
Edward A. Galloway	1,144.72
Talmadge Harris	65.10
Markel D. Harrison	1,524.36
Edward M. Hayes	1,980.35
Kenneth S. Henry	7,316.81
Mark A. Hofsdal	3,885.52
Melissa Howard	9,886.16
Calvin Johnson	647.05
Peggy Katra	5,644.82
Kirk Kingley	5,466.17
Kern Kline	13,000.17
Terry Livengood	801.06
George Lober	7,551.95
Deroy Looman	5,766.56
Martin Ludwick	2,786.80
Andrew Mahoney	1,561.16
Theodore Marchese	2,089.37
Malcolm MacNab	3,214.32

Dale Mertine	6,124.67
James McRoberts	*9,917.96*
John McQuiston	16,202.90
Michael J. Moran	2,066.83
Donald Morse	7,482.36
Jeffrey Moss	442.14
Kenneth J. Murray	2,167.31
Mark Newman	1,933.35
Michael J. O'Brien	6,281.80
Raul Orve	384.08
Richard Patchin	2,638.34
William Patchin, Sr.	6,334.74
William Patchin, Jr.	5,085.94
Jorge Perez	113.39
Robert J. Piron	3,568.79
Thomas A. Ricker	4,716.21
James Riggs	1,211.60
Milton Robertson	9,440.69
Rocco Ruggieri	1,416.77
Lyle Rose	1,503.83
Michael J. Rostanzo	8,041.82
Christopher D. Shepherd	5,230.22
Walter K. Morse	2,293.76
Rose M. Shepherd	3,899.59
Ronald Sherwood	12,575.03
Samuel Snyder	9,060.40
Gary Strickland	2,218.65
Kelly M. Swift	5,196.62
Donald Tindall	251.75
Kevin Thomas	1,204.40
Fred Toscano	511.05

Herman J. Toscano		483.87
Carlos Vasquez		8,840.39
Albert Venezia		10,647.10
Leo Villegas		147.85
Jeffrey Walls		11,031.99
Brent D. Warner		5,813.77
Brian Lee Warner		12,487.41
Randy Weiher		12,919.26
Ronald Witzel		10,919.19
Jauier Zarte		101.86
David Katra		193.04
	TOTAL:	$387,452.50

Appendix E—Order of the New York State Court of Appeals Dated September 15, 1992.

STATE OF NEW YORK

COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the fifteenth day of September A.D. 1992

Present:

Hon. Sol Wachtler, Chief Judge, presiding.

3- Mo. No. 763

IN THE MATTER

OF

SIERRA TELCOM SERVICES, INC.,

Appellant,

v.

THOMAS F. HARTNETT, as Commissioner of Labor, *et al.*,

Respondents.

(Proceeding No. 1)

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellant herein and papers having been submitted thereon and due deliberation having been thereupon had it is

ORDERED, that the said motion be and the same hereby is denied with one hundred dollars costs and necessary reproduction disbursements.

Donald M. Sheraw
Clerk of the Court

Appendix F—Constitutional, Statutory and Regulatory Provisions Involved.

[Amendments to the New York State statutes, although most are not applicable here, are included nonetheless for the sake of completeness.]

AMENDMENT V—GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Materials for the Equal Protection Clause of Section 1 and Sections 2 to 5 are set out in this volume. See the preceding three volumes for materials pertaining to the Citizenship, Privileges and Immunities, and Due Process Clauses of Section 1.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not

taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

§ 1257. State courts; appeal; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

(b) For the purposes of this section, the term "highest court of a State" includes the District of Columbia Court of Appeals.

§ 137. Bond to secure payment of certain claims arising from a public improvement; enforcement

1. In addition to other bond or bonds, if any, required by law for the completion of a work specified in a contract for the prosecution of a public improvement for the state of New York a municipal corporation, a public benefit corporation or a commission appointed pursuant to law, or in the absence of any such requirement, the comptroller may or the other appropriate official, respectively, shall nevertheless require prior to the approval of any such contract a bond guaranteeing prompt payment of moneys due to all persons furnishing labor or materials to the contractor or his subcontractors in the prosecution of the work provided for in such contract.

2. A copy of such payment bond shall be kept in the office of the head of the department or bureau having charge of the public improvement in connection with which the bond was given and a copy shall also be kept in the office of the comptroller or other appropriate official; such copies shall be open to public inspection.

3. Every person who has furnished labor or material, to the contractor or to a subcontractor of the contractor, in the prosecution of the work provided for in the contract and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was performed or material was furnished by him for which the claim is made, shall have the right to sue on such payment bond in his own name for the amount, or the balance thereof, unpaid at the time of commencement of the action; provided, however, that a person having a direct contractual relationship with a subcontractor of the contractor furnishing the payment bond but no contractual relationship express or implied with such contractor shall not have a right of action upon the bond unless he shall have given written notice to such contractor within one hundred twenty days from the date on which the last of the labor was performed or the last of the material was furnished, for which his claim is made, stating with substantial accuracy the amount claimed and the name of the party to whom the material was furnished or for whom the labor was performed. The notice shall be served by delivering the same personally to the contractor or by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place where he maintains an office or conducts his business or at his residence; provided, however, that where such notice is actually received by the contractor by other means, such notice shall be deemed sufficient.

4. (a) A payment bond required pursuant to this section may provide that the place of trial of an action on the bond shall be in the county in which the contract of the contractor who furnished the bond was to be performed or if such contract was to be performed in more than one county, then in any such county, and not elsewhere.

(b) No action on a payment bond furnished pursuant to this section shall be commenced after the expiration of one year from the date on which final payment under the claimant's subcontract became due.

(c) In any action on a payment bond furnished pursuant to this section, any judgment in favor of a subcontractor or material supplier may include provision for the payment of interest upon the amount recovered from the date when demand for payment was made pursuant to the labor and material payment bond and provided further that the court may determine and award reasonable attorney's fee to either party to such action when, upon reviewing the entire record, it appears that either the original claim or the defense interposed to such claim is without substantial basis in fact or law.

5. (a) The expression "furnishes material" or other similar expression wherever used in this section shall be deemed to include the reasonable rental value for the period of actual use of machinery, tools or equipment, and the value of compressed gases furnished for welding or cutting, and the value of fuel and lubricants consumed by machinery operating on the improvement, or by motor vehicles owned, operated or controlled by the contractor or his subcontractors while engaged exclusively in the transportation of materials to or from the improvement for the purposes thereof.

(b) The expression "moneys due to persons furnishing labor to the contractor or his subcontractors" includes all sums payable to or on behalf of persons furnishing labor to the contractor or his subcontractors, for wages, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance or other benefits, payment of which is required pursuant to the labor law or by the contract in connection with which the bond is furnished or by a collective bargaining agreement between organized labor and the contractor or subcontractor, and which are computed upon labor performed in the prosecution of the contract. A trustee or other person authorized to collect such payments shall have the right to sue on the payment bond in his own name and

subject to the same conditions as if he were the person performing the labor upon which such sums are computed.

(L.1940, c. 593; amended L.1945, c. 480, § 1; L.1964, c. 700, § 1; L.1972, c. 419, § 1; L.1980, c. 360, §§ 1, 2; L.1980, c. 698, § 1; L.1985, c. 137, § 10.)

(As amended L.1991, c. 664, § 1.)

§ 137. Bond to secure payment of certain claims arising from a public improvement; enforcement

1. In addition to other bond or bonds, if any, required by law for the completion of a work specified in a contract for the prosecution of a public improvement for the state of New York a municipal corporation, a public benefit corporation or a commission appointed pursuant to law, or in the absence of any such requirement, the comptroller may or the other appropriate official, respectively, shall nevertheless require prior to the approval of any such contract a bond guaranteeing prompt payment of moneys due to all persons furnishing labor or materials to the contractor or his subcontractors in the prosecution of the work provided for in such contract. Provided, however, that all performance bonds and payment bonds may, at the discretion of the head of the state agency, public benefit corporation or commission, or his or her designee, be dispensed with for the completion of a work specified in a contract for the prosecution of a public improvement for the state of New York for which bids are solicited where the aggregate amount of the contract is under fifty thousand dollars. Provided further, that in a case where a performance or payment bond is dispensed with, twenty per centum may be retained from each progress payment or estimate until the entire contract work has been completed and accepted, at which time the head of the state agency, public benefit corporation or commission shall, pending the payment of the final estimate, pay not to exceed seventy-five per centum of the amount of the retained percentage.

[See main volume for text of 2 to 5]

Historical and Statutory Notes

1991 Amendments. Subd. 1. L.1991, c. 664, § 1, eff. Aug. 25, 1991, permitted performance and payment bonds for contracts under $50,000 to be dispensed with and authorized retention of portion of progress payment in lieu thereof.

§ 220. Hours, wages and supplements

1. Eight hours shall constitute a legal day's work for all classes of employees in this state except those engaged in farm and domestic service unless otherwise provided by law.

2. Each contract to which the state or a public benefit corporation or a municipal corporation or a commission appointed pursuant to law is a party and which may involve the employment of laborers, workmen or mechanics shall contain a stipulation that no laborer, workman or mechanic in the employ of the contractor, subcontractor or other person doing or contracting to do the whole or a part of the work contemplated by the contract shall be permitted or required to work more than eight hours in any one calendar day or more than five days in any one week except in cases of extraordinary emergency including fire, flood or danger to life or property. No such person shall be so employed more than eight hours in any day or more than five days in any one week except in such emergency. Extraordinary emergency within the meaning of this section shall be deemed to include situations in which sufficient laborers, workmen and mechanics cannot be employed to carry on public work expeditiously as a result of such restrictions upon the number of hours and days of labor and the immediate commencement or prosecution or completion without undue delay of the public work is necessary in the judgment of the industrial commissioner [1] for the preservation of the contract site and for the protection of the life and limb of the persons using the same. Upon the application of any person interested, the industrial commissioner shall make a determination as to whether or not on any public project or on all public projects in any area of this state, sufficient laborers, workmen and mechanics of any or all classifications can be employed to carry on work expeditiously if their labor is restricted to eight hours per day and five days per week, and in the event that the industrial commissioner determines that there are not sufficient workmen, laborers and mechanics of any or all classifications which may be employed to carry on such work expeditiously if their labor is restricted to eight hours per day and five days per week, and the immediate commencement or prosecution or completion without undue delay of the public work is necessary in the judgment of the industrial commissioner for the preservation of the contract site and for the protection of the life and limb of the persons using the same, the industrial commissioner shall grant a dispensation, permitting all laborers, workmen and mechanics, or any classification of such laborers, workmen and mechanics, to work such additional hours or days per week on such

public project or in such areas the industrial commissioner shall determine. Whenever such a dispensation is granted, all work in excess of eight hours per day and five days per week shall be considered overtime work, and the laborers, workmen and mechanics performing such work shall be paid a premium wage commensurate with the premium wages prevailing in the area in which the work is performed. No such dispensation shall be effective with respect to any public work unless and until the department of jurisdiction, as defined in this section, certifies to the industrial commissioner that such public work is of an important nature and that a delay in carrying it to completion would result in serious disadvantage to the public. Time lost in any week because of inclement weather by employees engaged in the construction, reconstruction and maintenance of highways outside of the limits of cities and villages may be made up during that week and/or the succeeding three weeks.

2-a. Any person or corporation contracting with the state or a public benefit corporation, or a municipal corporation, or a commission appointed pursuant to law that shall require more than eight hours work for a day's labor, unless otherwise permitted by law, is guilty of a misdemeanor, and upon conviction therefor shall be punished by a fine of not less than five hundred dollars nor more than one thousand dollars for each offense.

3. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be paid not less than the prevailing rate of wages as hereinafter defined. No employee shall be deemed to be an apprentice unless he is individually registered in an apprenticeship program which is duly registered with the industrial commissioner [1] in conformity with the provisions of article twenty-three of this chapter. The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be not less than the prevailing rate for a day's work in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used and shall be paid in cash; provided, however, than [2] an employer may pay his employees by check upon a certificate of the industrial commissioner to be issued only after a hearing upon the application to pay by check, which hearing shall

be with notice of at least five days to be served personally or by mail on all interested persons, or if not served as aforesaid, then to be published in a manner directed by the industrial commissioner, which shall afford interested persons the opportunity to appear and be heard at such hearing, and after proof has been furnished satisfactorily to the industrial commissioner of the employer's financial responsibility and the employer gives assurance that such checks may be cashed by employees without difficulty and for the full amount for which they are drawn. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be paid the wages herein provided.

The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality, as hereinafter defined. Serving laborers, helpers, assistants and apprentices shall not be classified as common labor and shall be provided supplements in accordance with the prevailing practices as hereinafter defined. No employee shall be deemed to be an apprentice unless he is individually registered in an apprenticeship program which is duly registered with the industrial commissioner [1] in conformity with the provisions of article twenty-three of this chapter. The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon any material to be used upon or in connection therewith, shall be in accordance with the prevailing practices in the same trade or occupation in the locality within the state where such public work on, about or in connection with which such labor is performed in its final or completed form is to be situated, erected or used. Such contracts shall contain a provision that each laborer, workman or mechanic, employed by such contractor, subcontractor or other person about or upon such public work, shall be provided the supplements as required in this article.

It shall be the duty of the fiscal officer, as defined in this section, to ascertain and determine the schedules of supplements to be provided and wages to be paid workmen, laborers and mechanics on such public work, prior to the time of the advertisement for bids, and such schedules shall be annexed to and form a part of the specifications for the work. Such fiscal officer shall file with the department having jurisdiction such schedules to the time of the commencement of the advertisement for bids on all public works proposed to be constructed. The term "contract" as used in this subdivision also shall include reconstruction and repair of any such public work.

Any person or corporation that wilfully pays or provides after entering into such contract, less than such stipulated wage scale or supplements as established by the fiscal officer shall be guilty of a misdemeanor and upon conviction shall be punished for such first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or both fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state, municipal corporation or commission or board appointed pursuant to law pay the same or authorize its payment from the funds under his charge or control to any person or corporation for work done upon any contract, on which the contractor has been convicted for second offense in violation of the provisions of this section.

3-a. a. It shall be the duty of the department of jurisdiction as defined in this section to ascertain from the plans and specifications the classification of workmen, mechanics and laborers to be employed on such project. Such department shall file with the fiscal officer, as defined in this section, the classification of workmen, mechanics and laborers to be employed upon such public works project, together with a statement of the work to be performed by each such classification. From such statement it shall be the duty of the fiscal officer to make a proper classification of such workmen, mechanics and laborers taking into account whether the work is heavy and highway, building, sewer and water, tunnel work or residential and to make a determination of the schedules of wages and supplements to be paid or provided, as the case may be, therefor. The contractor and every sub-contractor on public works contracts shall post in a prominent and accessible place on the site of the work a legible statement of all wage rates and supplements as specified in the contract to be paid or provided, as the case may be, for the various classes of mechanics, workingmen, or laborers employed on the work. The contractor and every sub-contractor shall keep original payrolls or transcripts thereof, subscribed and affirmed by him as true under the penalties of perjury, showing the hours and days worked by each workman, laborer or mechanic, the occupation at which he worked, the hourly wage rate paid and the supplements paid or provided, on the site of the work where the contractor or sub-contractor maintains no regular place of business in New York state and where the amount of the contract is in excess of twenty-five thousand dollars. All other contractors or sub-contractors shall produce within five days on the site of the

work and upon formal order of the commissioner or his designated representative such original payrolls or transcripts thereof, subscribed and affirmed by him as true under the penalties of perjury, as may be deemed necessary to adequately enforce the provisions of this article. The original payrolls or transcripts shall be preserved for three years from the date of completion of the work on the awarded contract. The department of jurisdiction as herein referred to shall be the department of the state, board or officer in the state, or municipal corporation or commission or board appointed pursuant to law, whose duty it is to prepare or direct the preparation of the plans and specifications for a public work project.

b. All departments of jurisdiction in respect of public work as to which the industrial commissioner [1] is fiscal officer, as defined in this section, shall furnish to the industrial commissioner the following information immediately upon signing of a contract for such public work: (a) the name and address of the contractor engaged by said department of jurisdiction; (b) the date when the contract was let; (c) the approximate consideration stipulated for in said contract.

c. The fiscal officer may require any person or corporation performing such public work to file with the fiscal officer within ten days of receipt of said request, payroll records, sworn to as to their validity and accuracy, requested by the fiscal officer, for said public work or for any public or private work performed by said person or corporation during the same period of time as said public work. In the event said person or corporation fails to provide the requested information within the allotted ten days, the fiscal officer shall, within fifteen days, order the department of jurisdiction to immediately withhold from payment to said person or corporation up to twenty-five percent of the amount, not to exceed one hundred thousand dollars, to be paid to said person or corporation under the terms of the contract pursuant to which said public work is being performed. Said amount withheld shall be immediately released upon receipt by the department of jurisdiction of a notice from the fiscal officer indicating that the request for records had been satisfied.

3-b. 1. Public work advisory board. There is hereby created in the department an advisory board on public work composed of twelve members to be appointed by the governor by and with the advice and consent of the senate. Four members of the advisory board shall be persons known to represent the interests of employers in the construction industry, four persons shall be known to

represent the interest of employees therein, and four members shall be persons appointed to represent the public. The governor may remove any member when he ceases to represent the interests in whose behalf he was appointed. The industrial commissioner shall be an additional member of such board without any voting power and act as chairman thereof and shall designate an employee of the department to be secretary. The board shall meet at the call of the industrial commissioner [1] and when engaged upon the work of the board each member, except the commissioner, shall receive the per diem allowance appropriated therefor, and reasonable traveling and other expenses to be audited by the state comptroller.

2. Terms of office. The governor shall appoint two members from among persons known to represent employers in the construction industry, two members from among persons known to represent the interests of employees therein, and two members to represent the public, each to serve for a term of two years; and shall appoint one member from each of the three groups above described to serve for a term of four years; and shall appoint one member from each of such groups to serve for a term of six years. All members of the advisory board appointed thereafter shall be appointed for a term of six years to begin at the expiration of the term of office of the member whom he is to succeed. Any member appointed to fill a vacancy occurring otherwise than by expiration of term shall be appointed for the unexpired term of the member whom he is to succeed.

3-c. The advisory board shall adopt rules and regulations to govern its own proceedings, and to expedite the making by it of the examinations and determinations required by this chapter. The members of the advisory board shall have power:

1. To issue subpoenas for and compel the attendance of witnesses and the production of books, contracts, papers, documents and other evidence;

2. To hear testimony and take or cause to be taken depositions of witnesses residing within or without this state in the manner prescribed by law for like depositions in civil actions in the supreme court. Subpoenas and commissions to take testimony shall be issued under the seal of the department.

3-d. The fiscal officer of any political subdivision of the state, wherein a public work project is proposed to be constructed, may request the industrial commissioner to make a classification by

trades or occupations of laborers, workmen and mechanics required to perform the public work in its completed form. The board shall, when requested by the industrial commissioner,[1] examine into proposed public work projects and determine the classification by trades or occupations of laborers, workmen and mechanics required to perform the public work in its completed form; and to determine which of same are skilled, semi-skilled or unskilled. The board shall file with the industrial commissioner its findings, determinations and recommendations.

3-e. Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide program registered with the New York State Department of Labor. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his work force on any job under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the New York State Department of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish written evidence of the registration of his program and apprentices as well as of the appropriate ratios and wage rates, for the area of construction prior to using any apprentices on the contract work.

4. This section shall not apply to:

a. Stationary firemen in state hospitals;

b. Other persons regularly employed in the state institutions, except mechanics;

c. Engineers, electricians and elevator men in the bureau of building management of the office of general services during the annual session of the legislature.

5. Definitions. a. The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed. The prevailing rate of wage shall be annually determined in accordance herewith by the fiscal officer no later than thirty days prior to July first of each year, and the prevailing rate of wage for the period commencing July first of such year through June thirtieth, inclusive, of the

following year shall be the rate of wage set forth in such collective bargaining agreements for the period commencing July first through June thirtieth, including those increases for such period which are directly ascertainable from such collective bargaining agreements by the fiscal officer in his annual determination. In the event that it is determined after a contest, as provided in subdivision six of this section, that less than thirty percent of the workers, laborers or mechanics in a particular trade or occupation in the locality where the work is being performed receive a collectively bargained rate of wage, then the average wage paid to such workers, laborers or mechanics in the same trade or occupation in the locality for the twelve-month period preceding the fiscal officer's annual determination shall be the prevailing rate of wage. Laborers, workers or mechanics for whom a prevailing rate of wage is to be determined shall not be considered in determining such prevailing wage.

b. "Supplements," for the intents and purposes of this article, means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not "wages" within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance.

c. "Prevailing practices in the locality," for the intents and purposes of this article, shall be the practice of providing supplements, as hereinbefore defined, as provided by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality, as determined by the fiscal officer in accordance with the provisions herein.

With respect to each supplement determined to be one of the prevailing practices in the locality, the amount of such supplement shall be determined in the same manner and at the same times as the prevailing rate of wage is determined pursuant to this section.

d. "Locality" means such areas of the state described and defined for a trade or occupation in the current collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public and private work.

e. The "fiscal officer," as used herein, shall be deemed to be, on public work performed by or on behalf of the state or a public benefit corporation or a county or a village, or other civil division of

the state, except a city, with a population in excess of one million, the commissioner of labor; and on public work performed by or on behalf of a city with a population in excess of one million, the comptroller or other analogous officer of such city.

f. The term "verified complaint," as applied to a claim against a municipality, shall include a verified demand or verified notice of claim heretofore, and since the first day of January, nineteen hundred thirty-five, filed with the fiscal officer of such municipality in accordance with the provisions of the local charter or local laws or ordinances relating generally to the filing of claims or demands against such municipality; and any person who has filed such a demand or notice shall be deemed to have filed a verified complaint as of the date, not earlier than the first day of January, nineteen hundred thirty-five, mentioned in such notice or demand as the commencement of the period in relation to which such claim or demand is made.

6. The fiscal officer, may, and on the written request of any interested person shall, require any person or corporation performing such public work to file with such fiscal officer schedules of the supplements to be provided and wages to be paid to such laborers, workmen or mechanics. Any such person or corporation shall, within ten days after the receipt of written notice of such requirement, file with the fiscal officer such schedules of wages and supplements. An employer may contest a determination by the fiscal officer under paragraphs a and c of subdivision five of this section. The employer must allege and prove by competent evidence, that the actual percentage of workers, laborers or mechanics is below the required thirty per centum and during the pendency of any such contest and until final determination thereof, the work in question shall proceed under the rate established by the fiscal officer.

7. Compliance investigations. The fiscal officer as herein defined shall on a verified complaint in writing of any person interested or of any employee organization pursuant to subdivision eight-d, and may on his own initiative cause a compliance investigation to be made to determine whether the contractor or a subcontractor has paid the prevailing rate of wages and prevailing practices for supplements in the same trade or occupation in the locality within the state where such public work is being performed, or the hours of labor performed by the workmen, laborers and mechanics employed on such public work, or both. The fiscal officer or his agents, examiners and inspectors may examine or cause to be examined the books and records pertaining to the rate of wages

paid and supplements provided to the laborers, workmen and mechanics on said public work and the hours of labor performed by such laborers, workmen and mechanics on said public work. The fiscal officer in such investigation shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such fiscal officer shall make an order or determination not later than six months after the filing of such verified complaint.

7-a. The fiscal officer must make an inquiry as to the willfulness of the alleged violation which is the subject of a compliance investigation pursuant to subdivision seven of this section. In the event a formal hearing is held pursuant to subdivision eight of this section, the fiscal officer, upon a review of the entire record and a finding of credible evidence, must make a determination, as to the willfulness of said violation. No finding of willfullness made pursuant to the provisions of this subdivision shall be dispositive for the purposes of section one hundred ninety-eight-a of this chapter or of the last undesignated paragraph of subdivision three of this section.

8. Hearings. Before issuing an order or determination as provided in subdivision seven, the fiscal officer shall order a hearing thereon at a time and place to be specified, and shall give notice thereof, together with a copy of such complaint or the purpose thereof, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on any person or corporation affected thereby; such person or corporation shall have an opportunity to be heard in respect to the matters complained of at the time and place specified in such notice, which time shall be not less than five days from the service of the notice personally or by mail. The fiscal officer in such hearing shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such hearing shall be expeditiously conducted and upon such hearing the fiscal officer shall determine the issues raised thereon and shall make and file an order in the office of the fiscal officer stating such determination, and forthwith serve a copy of such order, with a notice of the filing thereof, upon the parties to such proceeding, personally or by mail. Such order shall direct payment of wages or supplements found to be due, including interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section

fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment, provided, however, that such interest rate shall not apply to subdivision eight-c of this section.

In addition to directing payment of wages or supplements including interest found to be due, such order may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. In assessing the amount of the penalty, due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and the failure to comply with recordkeeping or other non-wage requirements. Where the fiscal officer is the commissioner, the penalty shall be paid to the commissioner for deposit in the state treasury. Where the fiscal officer is a city comptroller or other analogous officer, the penalty shall be paid to said officer for deposit in the city treasury.

Upon the entry of such order any party to the proceeding aggrieved thereby may review the said proceeding pursuant to article seventy-eight of the civil practice law and rules within thirty days from the notice of the filing of the said order in the office of the fiscal officer. Said appeal shall be directly to the appellate division of the supreme court. If such order is not reviewed, or is so reviewed and the final decision is in favor of the complainant and the order involves or relates to the rate of wages paid or the supplements provided on such public work, the complainant or any other person affected may within six months after the service of notice of the filing of said order, or the notice of entry of said final decision on review, institute an action against the person or corporation found violating this act for the recovery of the difference between the sum actually paid or provided and the amount which should have been paid or provided, together with interest at the rate of interest provided herein, as determined by said order or decision, as the case may be, from and after the date of the filing of said verified complaint, with the fiscal officer or of the filing of the fiscal officer's report of investigation made on his own initiative.

8-a. Notwithstanding any inconsistent provision of this chapter or of any other general, special or local law, ordinance, charter or administrative code, the prior receipt without protest of the wages, salary or supplements paid or provided, as the case may be, to the complainant or any other person affected by such final order, or his failure to state orally or in writing upon any payroll or receipt

which he is required to sign that the wages, salary or supplements received by him is received under protest, or to indicate in any other way his protest against the amount thereof, or that the amount so paid does not constitute payment in full of the wages or salary due him for the period covered by such payment, or that the supplements provided do not constitute the full supplements due him, shall not be a bar to his right to recover, in accordance with the provisions of subdivision eight, the difference between the sum actually paid or provided, as the case may be, and the amount which should have been paid or provided, as the case may be, as determined by such final order.

8-b. Notwithstanding any inconsistent provision of this chapter or of any other general, special or local law, ordinance, charter or administrative code, an employee of a municipal corporation, irrespective of the title of his position or employment, whose salary or wage or supplement is fixed by reference to a prevailing rate of wage determined or to a prevailing practice for supplements determination and established by a final order in a proceeding instituted under this section, shall not be barred from his right to recover, in accordance with the terms of such fixation, the difference between the amount actually paid to him and the amount which should have been paid to him or provided, as the case may be, pursuant to such fixation, because of the prior receipt by him without protest of the salary, wages or supplements paid or provided to him, as the case may be; or because he did not previously protest his prior failure to be provided with any supplement whatsoever; or on account of his failure to state orally or in writing upon any payroll or receipt which he is required to sign that the salary or wages or supplements received by him is received under protest, or on account of his failure to indicate his protest against the amount or non-provision thereof or that the amount so paid or provided does not constitute payment or provision, as the case may be, in full of the salary, wages or supplement due him for the period covered by such payment.

8-c. Interest at six percentum per annum shall begin to accrue sixty days after a final determination made by a fiscal officer on the difference between the prevailing wages so determined, and which should have been paid to an employee of a municipal corporation, and the amount actually received by him. Said accumulated interest shall be paid to the employee when back pay based on the determination is paid to him.

8-d. Notwithstanding any inconsistent provision of this chapter or of any other law, in a city of one million or more, where a majority of laborers, workmen or mechanics in a particular civil service title are members of an employee organization which has been certified or recognized to represent them pursuant to the provisions of article fourteen of the civil service law or a local law enacted thereunder, the public employer and such employee organization shall in good faith negotiate and enter into a written agreement with respect to the wages and supplements of the laborers, workmen or mechanics in the title. If the parties fail to achieve an agreement, only the employee organization shall be authorized to file a single verified complaint pursuant to subdivision seven herein, on behalf of the laborers, workmen or mechanics so represented. Such employee organization shall be the sole and exclusive representative of such laborers, workmen or mechanics at any hearing pursuant to subdivision eight herein, and shall be the sole complainant in the proceeding for all purposes therein, including review pursuant to article seventy-eight of the civil practice law and rules. Service by the fiscal officer on the employee organization shall be sufficient notice to the laborers, workmen or mechanics so represented for all purposes of subdivision eight herein, except that the issuance and enforcement of subpoenas shall be regulated by the civil practice law and rules. Any order, compromise, or settlement determining the issues raised upon such a proceeding, which has not been taken up for review by the employee organization, shall be binding upon the laborers, workmen or mechanics represented by the employee organization. Nothing herein shall be construed to limit the rights of any laborer, workman or mechanic who has on file a verified complaint prior to the effective date of this subdivision.

9. When a final determination has been rendered, any person, or corporation that wilfully refuses thereafter to pay the rate of wages or to provide the supplements determined to be prevailing, or wilfully employs on such public work, laborers, workmen or mechanics more than the hours per day determined by said order until modified by order of the fiscal officer or court and thereby violates the provisions of this section shall be guilty of a misdemeanor and upon conviction shall be punished, for a first offense by a fine of five hundred dollars or by imprisonment for not more than thirty days, or by both such fine and imprisonment; for a second offense by a fine of one thousand dollars, and in addition thereto the contract on which the violation has occurred shall be forfeited; and

no such person or corporation shall be entitled to receive any sum nor shall any officer, agent or employee of the state or of a municipal corporation pay the same or authorize its payment from the funds under his charge or control to any such person or corporation for work done upon any contract, on which the contractor has been convicted of second offense in violation of the provisions of this section.

§ 220. Hours, wages and supplements

[See main volume for text of 1 to 5-a]

b. "Supplements," for the intents and purposes of this article, means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not "wages" within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay [1] life insurance, and apprenticeship training.

[See main volume for text of c to f; 6 to 7-a]

8. Hearings. Before issuing an order or determination as provided in subdivision seven, the fiscal officer shall order a hearing thereon at a time and place to be specified, and shall give notice thereof, together with a copy of such complaint or the purpose thereof, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on any person or corporation affected thereby; such person or corporation shall have an opportunity to be heard in respect to the matters complained of at the time and place specified in such notice, which time shall be not less than five days from the service of the notice personally or by mail. The fiscal officer in such hearing shall be deemed to be acting in a judicial capacity, and shall have the right to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such hearing shall be expeditiously conducted and upon such hearing the fiscal officer shall determine the issues raised thereon and shall make and file an order in the office of the fiscal officer stating such determination, and forthwith serve a copy of such order, with a notice of the filing thereof, upon the parties to such proceeding, personally or by mail. Such order shall direct payment of wages or supplements found to be due, including interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment, provided, however, that such interest rate shall not apply to subdivision eight-c of this section.

In addition to directing payment of wages or supplements including interest found to be due, such order may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. In assessing the amount of the penalty, due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and the failure to comply with recordkeeping or other non-wage

requirements. Where the fiscal officer is the commissioner, the penalty shall be paid to the commissioner for deposit in the state treasury. Where the fiscal officer is a city comptroller or other analogous officer, the penalty shall be paid to said officer for deposit in the city treasury.

Upon the entry of such order any party aggrieved thereby may commence a proceeding for the review thereof pursuant to article seventy-eight of the civil practice law and rules within thirty days from the notice of the filing of the said order in the office of the fiscal officer. Said proceeding shall be commenced directly in the appellate division of the supreme court. If such order is not reviewed, or is so reviewed and the final decision is in favor of the complainant and the order involves or relates to the rate of wages paid or the supplements provided on such public work, the complainant or any other person affected may within six months after the service of notice of the filing of said order, or the notice of entry of said final decision on review, institute an action against the person or corporation found violating this act for the recovery of the difference between the sum actually paid or provided and the amount which should have been paid or provided, together with interest at the rate of interest provided herein, as determined by said order or decision, as the case may be, from and after the date of the filing of said verified complaint, with the fiscal officer or of the filing of the fiscal officer's report of investigation made on his own initiative. Provided that no proceeding for judicial review as provided herein shall then be pending and the time for initiation of such proceeding shall have expired, the commissioner may file with the county clerk of the county where the employer resides or has a place of business the order of the fiscal officer containing the amount found to be due. The filing of such order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order may be enforced by and in the name of the commissioner in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment.

[See main volume for text of 8a to 9]

(As amended, L.1988, c. 314, § 1; L.1989, c. 642, § 1; L.1989, c. 752, § 1.)

[1] So in original. A comma should probably be inserted.

Historical and Statutory Notes

1989 Amendments. Subd. 5, par. b. L.1989, c. 752, § 1, eff. July 25, 1989, included remuneration paid for apprenticeship training within the definition of "supplements".

Subd. 8. L.1989, c. 642, § 1, eff. July 21, 1989, added provision for commissioner to file order for amount found owing pursuant to this section, and that such order is enforceable as a money judgment.

1988 Amendment. Subd. 8. L.1988, c. 314, § 1, eff. July 25, 1988, in sentence beginning "Upon the entry" substituted "any party aggrieved thereby may commence a proceeding for the review thereof" for "any party to the proceeding aggrieved thereby may review the said proceeding", and in sentence beginning "Said proceeding shall" substituted "Said proceeding shall be commenced directly in" for "Said appeal shall be directly to".

§ 220-b. Amounts due for wages and supplements may be withheld for benefit of laborers

1. In case any interested person shall have previously filed a protest in writing objecting to the payment to any contractor or subcontractor to the extent of the amount or amounts due or to become due to him for daily or weekly wages or supplements for labor performed on the public improvement for which such contract was entered into, or if for any other reason it may be deemed advisable, the comptroller of the state or the financial officer of the municipal corporation or other officer or person charged with the custody and disbursement of the state or corporate funds applicable to the contract for such public improvement may deduct from the whole amount of any payment on account thereof the sum or sums admitted by any contractor or subcontractor in such statement or statements so filed to be due and owing by him on account of labor performed on such public improvement before making payment of the amount certified for payment in any estimate or voucher, and may withhold the amount so deducted for the benefit of the laborers, workmen or mechanics whose wages or supplements are unpaid or not provided, as the case may be, as shown by the verified statements filed by any contractor or subcontractor, and may pay directly to any person the amount or amounts shown to be due to him or his duly authorized collective bargaining labor organization, as the case may be, for such wages or supplements by the statements filed as hereinbefore required, thereby discharging the obligation of the contractor or subcontractor to the person or his duly authorized collective bargaining labor organization receiving such payment to the extent of the amount thereof, or

2. When any interested person shall file a written complaint with the fiscal officer, as herein defined, alleging unpaid wages or supplements due for labor performed on a public improvement for which a contract has been entered into, and said labor is alleged to have been performed within the three-year period immediately preceding the date of the filing of said complaint, or if, on the fiscal officer's own initiative, unpaid wages or supplements appear to be due, the fiscal officer shall immediately so notify the financial officer of the civil division interested, who shall withhold from any payment on account thereof, due the contractor or subcontractor executing said public improvement, sufficient moneys to satisfy said wages and supplements, including interest at the rate provided herein, and any civil penalty that may be assessed as provided herein, pending a final determination. The fiscal officer shall then cause an investigation to be made to determine whether any

amounts are due to the laborers, workmen or mechanics, or on their respective behalves, on such public improvement, for labor performed after the commencement of the three-year period immediately preceding the filing of the complaint or the commencement of the investigation on his own initiative, as the case may be, and shall order a hearing thereon at a time and place to be specified and shall give notice thereof, together with a copy of such complaint, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on all interested persons, including the person complained against and upon the financial officer of the civil division interested; such person complained against shall have an opportunity to be heard in respect to the matters complained of, at the time and place specified in such notice, which time shall be not less than five days from the service of said notice. The fiscal officer in such an investigation shall be deemed to be acting in a judicial capacity and shall have the rights to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil practice law and rules. Such investigation and hearing shall be expeditiously conducted, and upon such hearing and investigation, the fiscal officer shall determine the issues raised thereon and shall make and file an order in his office stating such determination and forthwith serve a copy of such order, either personally or by mail, together with notice of filing, upon the financial officer of the civil division interested, and the parties to such proceedings and, if the fiscal officer be the comptroller or other analogous officer of a city, upon the industrial commissioner. Such order shall direct payment of wages or supplements found to be due, including interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment.

In addition to directing payment of wages or supplements including interest found to be due, the order of the fiscal officer may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. In assessing the amount of the penalty, due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and the failure to comply with recordkeeping or other non-wage requirements.

Upon the entry and service of such order, the financial officer of the civil division interested shall pay to the claimant, from the

moneys due to the contractor or subcontractor, the amount of the claim as determined by the fiscal officer and the amount of the civil penalty, if any, shall be paid as provided herein, provided that no proceeding pursuant to article seventy-eight of the civil practice law and rules for review of said order is commenced by any party aggrieved thereby within thirty days from the date said order was filed in the office of the fiscal officer. Said appeal shall be directly to the appellate division of the supreme court. Where the fiscal officer is the commissioner, the civil penalty shall be paid to the commissioner for deposit in the state treasury; where the fiscal officer is a city comptroller or other analogous officer, the penalty shall be paid to said officer for deposit in the city treasury. In the event that such a proceeding for review is instituted, moneys sufficient to satisfy the claim and civil penalty shall be set aside by the financial officer interested, subject to the order of the court.

2-a. The fiscal officer shall make an inquiry as to the willfulness of the alleged violation which is the subject of an investigation pursuant to subdivision two of this section. In the event a formal hearing is held pursuant to this section, the fiscal officer, upon a review of the entire record and a finding of credible evidence, must make a determination, as to the willfulness of such violation. No finding of willfulness made pursuant to the provisions of this subdivision shall be dispositive for the purposes of section one hundred ninety-eight-a of this chapter or of the last undesignated paragraph of subdivision three of section two hundred twenty of this article.

3. a. When final determination has been made and such determination is in favor of the complainant, said complainant may in addition to any other remedy provided by this article, institute an action in any court of appropriate jurisdiction against the person or corporation found violating this article for the recovery of the difference between the sum, if any, actually paid to him by the aforesaid financial officer pursuant to said order and the amount found to be due him as determined by said order. Such action must be commenced within three years from the date of the filing of said order, or if the said order is reviewed in a proceeding pursuant to article seventy-eight of the civil practice law and rules, within three years after the termination of such review proceeding.

b. When final determinations have been rendered against a person or corporation in two instances within any consecutive six-year period after October first, nineteen hundred sixty-six, determining that such person or corporation has wilfully failed to pay

the prevailing rate of wages or to provide supplements in accordance with this article, such person or corporation shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the second final determination.

c. Nothing in this subdivision shall be construed as affecting any provision of any other law or regulation relating to the awarding of public contracts.

§ 220–b. Amounts due for wages and supplements may be withheld for benefit of laborers

[See main volume for text of 1]

2. a. When any interested person shall file a written complaint with the fiscal officer, as herein defined, alleging unpaid wages or supplements due for labor performed on a public improvement for which a contract has been entered into, and said labor is alleged to have been performed within the three-year period immediately preceding the date of the filing of said complaint, or if, on the fiscal officer's own initiative, unpaid wages or supplements appear to be due, the fiscal officer shall immediately so notify the financial officer of the civil division interested, or, if there are insufficient moneys still due to the contractor or subcontractor on that contract to satisfy said wages and supplements, including interest and penalty, the financial officer of another civil division which has entered or subsequently enters into a public improvement contract with the contractor or subcontractor, who shall withhold from any payment due the contractor or subcontractor executing any public improvements, sufficient moneys to satisfy said wages and supplements, including interest at the rate provided herein, and any civil penalty that may be assessed as provided herein, pending a final determination. The financial officer shall immediately confirm in writing to the fiscal officer the amount of money withheld.

b. Moneys withheld pursuant to this section shall be held by the financial officer for the sole and exclusive benefit of the workers employed on said public improvement and for payment of any civil penalty that may be assessed as provided herein and shall not be used for any other purpose except upon court order. Any person, partnership, association, corporation or governmental body who files a lien or commences a judicial proceeding with respect to any monies withheld pursuant to this section shall notify the fiscal officer in writing of the lien or claim on or before the date of filing of the lien or commencement of the judicial proceeding. In any proceeding to obtain moneys withheld pursuant to this section by any person, partnership, association, corporation or governmental body, the fiscal officer shall have the right to appear and be heard.

c. The fiscal officer shall cause an investigation to be made to determine whether any amounts are due to the laborers, workmen or mechanics, or on their respective behalves, on such public improvement, for labor performed after the commencement of the three-year period immediately preceding the filing of the complaint or the commencement of the investigation on his own initiative, as the case may be, and shall order a hearing

thereon at a time and place to be specified and shall give notice thereof, together with a copy of such complaint, or a statement of the facts disclosed upon such investigation, which notice shall be served personally or by mail on all interested persons, including the person complained against and upon the financial officer of the civil division interested; such person complained against shall have an opportunity to be heard in respect to the matters complained of, at the time and place specified in such notice, which time shall be not less than five days from the service of said notice. The fiscal officer in such an investigation shall be deemed to be acting in a judicial capacity and shall have the rights to issue subpoenas, administer oaths and examine witnesses. The enforcement of a subpoena issued under this section shall be regulated by the civil ractice law and rules. Such investigation and hearing shall be expeditiously conducted, and upon such hearing and investigation, the fiscal officer shall determine the issues raised thereon and shall make and file an order in his office stating such determination and forthwith serve a copy of such order, either personally or by mail, together with notice of filing, upon the financial officer of the civil division interested, and the parties to such proceedings and, if the fiscal officer be the comptroller or other analogous officer of a city, upon the commissioner. Such order shall direct payment of wages or supplements found to be due, including interest at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law per annum from the date of the underpayment to the date of the payment.

d. In addition to directing payment of wages or supplements including interest found to be due, the order of the fiscal officer may direct payment of a further sum as a civil penalty in an amount not exceeding twenty-five percent of the total amount found to be due. In assessing the amount of the penalty, due consideration shall be given to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and the failure to comply with recordkeeping or other non-wage requirements.

e. Upon the entry and service of such order, the financial officer of the civil division interested shall pay to the claimant, from the moneys due to the contractor or subcontractor, the amount of the claim as determined by the fiscal officer and the amount of the civil penalty, if any, shall be paid as provided herein, provided that no proceeding pursuant to article seventy-eight of the civil practice law and rules for review of said order is commenced by any party aggrieved thereby within thirty days from the date said order was filed in the office of the fiscal officer. Said proceeding shall be commenced directly in the appellate division of the supreme court. Where the fiscal officer is the commissioner, the civil penalty shall be paid to the commissioner for deposit in the state treasury; where the fiscal officer is a city comptroller or other analogous officer, the penalty shall be paid to said officer for deposit in the city treasury. In the event that such a proceeding for review is instituted, moneys sufficient to satisfy the claim and civil penalty shall be set aside by the financial officer interested as provided in paragraph b of this subdivision, subject to the order of the court.

f. If the financial officer of the civil division interested fails to pay to the claimant the amount of the claim as determined by the fiscal officer

within ten days after the expiration of the contractor's time to commence a proceeding for review of the fiscal officer's order or, if such a proceeding has been commenced, within ten days after entry and service of a court order confirming the fiscal officer's order, the civil division interested shall pay to the claimant interest on the claim at the rate of interest then in effect as prescribed by the superintendent of banks pursuant to section fourteen-a of the banking law from the date the financial officer was required to pay the claim as provided herein to the date of payment; provided, however, this paragraph shall not apply if the failure of the financial officer of the civil division interested to pay the amount of the claim is pursuant to court order.

Provided that no proceeding for judicial review shall then be pending and the time for initiation of such proceeding shall have expired, the commissioner may file with the county clerk of the county where the employer resides or has a place of business the order of the fiscal officer containing the amount found to be due. The filing of such an order shall have the full force and effect of a judgment duly docketed in the office of such clerk. The order may be enforced by and in the name of the commissioner in the same manner, and with like effect, as that prescribed by the civil practice law and rules for the enforcement of a money judgment.

[See main volume for text of 2a to 3a]

b. When two final determinations have been rendered against a contractor or subcontractor and/or its successor within any consecutive six-year period determining that such contractor or subcontractor and/or its successor has wilfully failed to pay the prevailing rate of wages or to provide supplements in accordance with this article, whether such failures were concurrent or consecutive and whether or not such final determinations concerning separate public work projects are rendered simultaneously, such contractor or subcontractor and/or its successor shall be ineligible to submit a bid on or be awarded any public work contract or subcontract with the state, any municipal corporation or public body for a period of five years from the second final determination, provided, however, that where any such final determination involves the falsification of payroll records or the kickback of wages or supplements, the contractor or subcontractor and/or its successor shall be ineligible to submit a bid on or be awarded any public work contract with the state, any municipal corporation or public body for a period of five years from the first final determination. For purposes of this article, a successor shall mean an employer engaged in work substantially similar to that of the predecessor, where there is substantial continuity of operation with that of the predecessor.

[See main volume for text of c]

(As amended L.1988, c. 314, § 2; L.1988, c. 698, § 2; L.1989, c. 304, § 1; L.1989, c. 642, § 2; L.1989, c. 651, § 1; L.1991, c. 141, § 1; L.1991, c. 147, § 1; L.1991, c.169, § 1.)

Historical and Statutory Notes

1991 Amendments. Subd. 3, par. b. L.1991, c. 169, § 1, without incorporating changes made by L.1991, cc. 147 and 141, inserted disqualification for five years in cases involving falsified payroll records or kickbacks. See Effective Date of Amendment by L.1991, c. 169 note below.

Subd. 3, par. b. L.1991, c. 147, § 1, without incorporating changes made by L.1991, c. 141, inserted language denying consideration of whether violations were consecutive or concurrent or whether they involved different projects adjudicated simultaneously. See Effective Date of Amendment by L.1991, c. 147 note below.

Subd. 3, par. b. L.1991, c. 141, § 1, eff. May 24, 1991, made provisions applicable to subcontracts.

1989 Amendments. Subd. 2, par. a. L.1989, c. 304, § 1, eff. July 10, 1989, designated part of existing text as par. a, and added requirement for immediate confirmation of the amount of money withheld.

Subd. 2, par. b. L.1989, c. 304, § 1, eff. July 10, 1989, added par. b.

Subd. 2, pars. c to e. L.1989, c. 304, § 1, eff. July 10, 1989, designated part of existing text as pars. c to e.

Subd. 2, par. f. L.1989, c. 304, § 1, eff. July 10, 1989, added par. f.

L.1989, c. 642, § 2, eff. July 21, 1989, added par. relating to the filing by commissioner of orders for amounts due pursuant to this section.

Subd. 3, par. b. L.1989, c. 651, § 1, eff. July 21, 1989, substituted "contractor or subcontractor and/or its successor" for "person or corporation" throughout provision, deleted reference to October 6, 1966, and added definition for the term "successor".

1988 Amendments. Subd. 2. L.1988, c. 698, § 2, eff. Sept. 2, 1988, inserted provision relating to notice to financial officers of other civil divisions of unpaid wages claims.

L.1988, c. 314, § 2, eff. July 25, 1988, in sentence beginning "Said proceeding shall" substituted "Said proceeding shall be commenced directly in" for "Said appeal shall be directly to".

Effective Date of Amendment by L.1991, c. 169; Applicability. L.1991, c. 169, § 3, provided: "This act [amending this section and § 235] shall take effect 60 days after the date upon which it shall have become a law [eff. Aug. 14, 1991] and shall apply to any conduct occurring on or after such date."

Effective Date of Amendment by L.1991, c. 147; Applicability. L.1991, c. 147, § 3, provided:"This act [amending this section and § 235] shall take effect 60 days after the date upon which it shall have become a law [eff. July 23, 1991] and shall apply to any conduct occurring on or after such date."

Supreme Court, U.S.
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No. 92-1019

IN THE

Supreme Court of the United States

October Term, 1992

SIERRA TELCOM SERVICES, INC.,

Petitioner,

against

THOMAS F. HARTNETT, in his capacity as Commissioner of Labor, and STATE OF NEW YORK DEPARTMENT OF LABOR,

Respondents,

On Petition for a Writ of Certiorari to the New York State Court of Appeals

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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February 11, 1993

QUESTIONS PRESENTED

1. Whether the New York State Department of Labor's determination that petitioner Sierra Telcom Services Inc. ("Sierra") was required to pay wages on a public work project at the rate actually paid under a collective bargaining agreement in the private sector in the locality of the project conflicts with *General Electric Co. v. New York State Department of Labor*, 936 F. 2d 1448 (2d Cir. 1991), in which the United States Court of Appeals for the Second Circuit held that the adoption of a wage rate, as the prevailing wage rate on public work, from a collective bargaining agreement containing a two-tier wage which required that only the higher of the two wages be used in public work, whether or not that wage was paid on such work in the private sector, would be delegation of legislative power to private parties in violation of the Fourteenth Amendment to the United States Constitution?

2. Whether Sierra, the subcontractor on a public work project, has standing to raise the constitutionality of the State of New York's withholding of money due to the prime contractor on the project, Ericsson Business Communications, Inc. ("Ericsson"), where there is nothing in the record demonstrating any injury to Sierra as a result of that withholding?

3. Whether Sierra has a constitutionally protected property interest in money withheld by the State of New York from amount owed to the prime contractor, Ericsson.

4. Whether the procedural due process challenge of Sierra to the State of New York's withholding of money from Ericsson without prior hearing is moot because of the release of the withheld money, pursuant to a Commissioner of Labor's Order issued after a hearing.

5. Whether admission into evidence at the administrative hearing of three workers' statements regarding Sierra's underpayments of prevailing wages was in violation of rights guaranteed by the Fourteenth Amendment to the United States Constitution?

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No. 92-1019

IN THE

Supreme Court of the United States

October Term, 1992

SIERRA TELCOM SERVICES, INC.,

Petitioner.

vs.

THOMAS F. HARTNETT, in his capacity as Commissioner of Labor, and STATE OF NEW YORK DEPARTMENT OF LABOR,

Respondents,

ON PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Thomas F. Hartnett, Commissioner of the New York State Department of Labor [1]("Commissioner") and the New York State Department of Labor ("Department") hereby oppose the petition for a writ of certiorari filed by Sierra.

[1] Thomas F. Hartnett resigned as Commissioner of the New York State Department of Labor and was succeeded by John F. Hudacs on January 22, 1992.

ADDITIONAL STATUTORY PROVISIONS INVOLVED

In addition to the statutory provision reproduced in Sierra's appendix, Appendix F, pp. 72-98, further applicable statutory provisions contained in N.Y. Labor Law § 223 are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

1. Statutory Framework

New York Labor Law §220 requires that workers on public work projects be paid not less than the rate of wages prevailing in the locality where the project is located. Labor Law §220 (3). The prevailing wage rates for each trade are based on wages contained in collective bargaining agreements between employers and unions in the project area so long as the agreements cover at least 30% of the workers in that trade. Labor Law §220(5)(a). The Department determines annually the prevailing rate of wages for every trade and occupation performing public work in every locality in New York State. Labor §220(5)(a).

For each public work project, the Commissioner issues a wage rate schedule which lists, for each trade ("job classification"), the prevailing wage rates to be paid to workers on the project. Labor Law §220, (3-a)(a) and (5)(e). The wage schedule is included in the bid documents and becomes part of the contract. Labor Law §220(3). Contractors are obliged by law to pay not less than the wages specified in the schedule. Labor Law §220(3).

If it appears that unpaid wages may be due to workers on a project, the Department is required to notify the financial officer of the public entity which let the public work contract. The financial officer, in turn, is required to withhold, from the prime

contractor,[2] sufficient monies to satisfy estimated wage underpayments plus interest and possible penalties pending a hearing and final determination. Labor Law §220-b(2).

Final determinations are made after an administrative hearing where all parties may subpoena, examine, and cross-examine witnesses. The Commissioner determines whether there are underpayments and, if so, the amount thereof based upon the evidence admitted at the hearing. Interest on underpayments is required and a civil penalty of up to 25% may also be assessed by the Commissioner in the Order and Determination. Labor Law §220-b(2-a). The Commissioner's Order and Determination is subject to review in the New York appellate courts. Labor Law §220 b-(2).

2. Facts

On May 19, 1988 Ericsson entered into a contract with the State University of New York ("SUNY") to furnish, install and maintain a telecommunications system at the New Paltz, N.Y., campus (A 527).[3] In June, 1988, Ericsson subcontracted the installation of the telephone system to Sierra (A 751). The contract specifications included a prevailing wage schedule which described the project as "install voice/data telecommunications system" (A 703) and included prevailing

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[2] New York Labor Law § 223 makes a prime contractor financially liable for all prevailing wage underpayments of its subcontractors. Moreover, money can only be withheld from a prime contractor since the State does not enter into contracts with subcontractors.

[3] References to the Joint Appendix filed in the New York State Supreme Court, Appellate Division are cited as (A _____). References to the Full Record are cited as (R _____).

wage rates for various job classifications listed under the general category of "telephone" (A 705).[4]

On August 1, 1988, Public Work Wage Investigator Kevin Jones ("Jones") visited the job site and spoke to Sierra's project manager and to eight workers (A 294). The project manager informed Jones that all but a few workers were paid the lowest rate under the "linemen" job classification (A 305). The workers all informed Jones that their work involved some aspect of the installation of the telephone system, either pulling wires or putting in conduits (A 295).

Because Sierra claimed the "linemen" job classification applied, Jones spoke to a representative of the union which represented linemen in the locality of the project (A 370). He learned that the linemen had a collective bargaining agreement which included a "telephone" wage rate, but that no work had been done under that agreement in Ulster County, the locality of the project. Therefore, that agreement had not been used by the Department to set the wage rate for telephone job classification or any other job classification in the schedule (A 322, 384). Jones also learned that the linemen job classification and wage rate which was in the prevailing wage schedule applied only to high tension wire work and traffic lights, not telephone installation (A 322). After investigating the

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[4] Two prevailing wage schedules were in effect during the project. The schedule in effect the first four weeks of the project provided that the wage to be paid under the telephone classification was $16.97. This was the wage rate contained in the Electrician collective bargaining agreement of International Brotherhood of Electrical Workers ("IBEW") Local 806 (A 531). That local was taken over by IBEW Local 631 which did telephone installation work under a Telephone Interconnect Agreement. The wage rates in that agreement ranged from $16.25 for telephone installation to $19.25 for PBX installation (A 538). The schedule in effect for most of the project contained those wage rates for the telephone job classification (A 381).

classifications, Jones returned to the site and informed Sierra that the "telephone" job classification in the schedule and not the linemen classification, was the correct one to be used on the project (A 305, 309).

Jones met with Sierra's project manager on November 7, 1988, at which point he determined that Sierra was still paying the wage rate for linemen. He obtained payroll records to conduct an audit and informed Sierra that the Department would issue to SUNY a notice to withhold contract funds from the prime contractor, Ericsson (A 307). On November 17, 1988, Jones spoke to Ericsson's job superintendent, Eric Strassen, to discuss the wage rate which Sierra should be paying (A 311). Strassen pointed out that the new wage schedule had a lower rate for telephone installation, and they agreed that Sierra would be required to pay that lower rate for the rest of the project (A 312). On November 23, 1988, the Department informed SUNY to withhold $505,331 from payments otherwise due to Ericsson.[5] The withholding was sufficient to cover an estimated $348,504.21 in underpayments, plus interest and a 25% civil penalty (A 1152).

In January and February 1989, Jones met with 3 workers on the project. He obtained signed statements from each worker which described the work each performed on the project (A 838-855). He also spoke to Ericsson's project manager and Sierra's project manager, who confirmed the workers' statements (A 512-14).

Work on the project was completed in February, 1989 (R 1049). The Department continued to audit Sierra. On December 18, 1989 the Department issued a final notice of

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[5] Although Sierra claims that Ericsson then withheld money which Ericsson owed to it, no such fact is contained in the record. .

labor law investigation which showed that Sierra had underpaid 81 employees in the amount of $387,751.41 (A. 1148).

3. Administrative Proceeding

On October 4, 1990, an administrative hearing was held to determine whether Sierra had failed to pay prevailing wages and/or supplements to all 81 workers on the project. Ericsson and Sierra asked the hearing officer to issue a subpoena to the Department for a broad array of Departmental records (A 269). After hearing argument, the hearing officer declined to do so on the grounds that all relevant material, including all of the Department's internal files concerning the investigation, had been already produced by the Department (A 363).[6]

Jones was the only witness at the hearing. He testified that he determined the classification of the workers on the project according to the prevailing practices in the area as determined by the collective bargaining agreements which were used to set the prevailing wage rates (A 368, 428). Jones testified that he classified all the workers on the project as telephone workers since the project involved only the installation of a telephone system (A 387).[7] He also testified that the linemen job classification covered only high tension wire work and traffic signals, not telephone installation. The Department had used the Local 613 Telephone Interconnect Collective Bargaining

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[6] During cross-examination of Jones, he mentioned the existence of a Departmental Procedure Manual which was not included in Ericsson's and Sierra's request for a subpoena. It was then produced by the Department upon Ericsson's and Sierra's request (A 442).

[7] Jones classified seventy-two workers as telephone installers, the telephone job classification with the lowest rate on the schedule (A 387). Nine other workers were classified as PBX installers or telephone technician, telephone job classifications with higher wage rates, based upon information received from the workers and/or from Sierra (A 438-9).

Agreement to promulgate the four wage rates for the telephone job classification in the wage schedule. Jones testified that this agreement covered all aspects of installing a telephone system, from unloading trucks when the workers arrive to clean-up at the end (A 372). He arrived at the specific telephone classification for each worker based upon Sierra's payroll records,[8] information he received from the workers he interviewed, and conversations with Local 631, Ericsson, and Sierra (A 345).

Statements of three workers on the project concerning the work that each had performed were introduced into evidence over the objections of Sierra and Ericsson (A 287). Sierra and Ericsson engaged in extensive cross-examination of Jones.[9] At the end of the Department's case, both Sierra and Ericsson moved to dismiss the case, which motions were denied. Neither Sierra nor Ericsson subpoenaed or called any witnesses, nor did they claim that they were unable to do so. Both Sierra and Ericsson declined to offer any testimony, although they did introduce some exhibits into evidence (A 1156-1182).

On March 29, 1991, the Commissioner issued an Order and Determination which adopted the report and recommendations of the hearing officer (A 226). The hearing officer found that Sierra violated § 220 by underpaying all 81 workers on the project. The hearing officer found that Jones properly determined that the workers should be classified as telephone installers and telephone technicians based upon interviews with 11 employees, conversations with Sierra's and Ericsson's

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[8] Sierra's payroll records classified all the workers as either linemen or telephone installers (R. 1049-1422).

[9] On cross-examination, Jones was repeatedly asked if he had written materials provided to him by Sierra (A 410, 479). He indicated that he had been provided some written material at a meeting with Sierra manager, but it was not relevant to job classification and he did not retain it (A 410, 479).

project managers, union business agents, and his supervisor, his review of the payroll records, the project documents, SUNY's request for a schedule and the schedule itself (A 170, 176-177). Ericsson and Sierra had failed to provide any evidence to refute Jones' determination (A 175). The hearing officer found Sierra's violations wilful and recommended a 10% civil penalty. Finally, pursuant to Labor Law § 223, Ericsson, as the prime contractor, was held financially responsible for Sierra's violations (A 179). Sierra and Ericsson appealed to the New York State Supreme Court, Appellate Division, Third Department. That Court of Appeals affirmed the Commissioner's decision in its entirety. *Sierra Telcom Services, Inc. v. Hartnett et al.*, 174 A.D.2d 279 (3d Dept. 1992) *app. den* 80 N.Y.2d 757 (1992), *leave app. den.* 80 N.Y.2d 757 (1992).

SOME CONSTITUTIONAL QUESTIONS WERE NOT PRESERVED BELOW

Although Sierra objected to the hearing officer's refusal to issue a subpoena at the administrative hearing, it never preserved the issue in its appeal to the Appellate Division, or in its attempts to have the Court of Appeals hear the case, either by appeal as of right, or by motion for leave to appeal.[10]

SUMMARY OF ARGUMENT

The Court should deny the petition for a writ of certiorari. There is no conflict between the decision of the New York State Supreme Court, Appellate Division and the opinion of the

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[10] That issue was preserved by Ericsson in a related appeal. The Appellate Division consolidated the appeals for purposes of oral argument and issued one opinion which addressed issues raised in each appeal. Ericsson preserved the subpoena issue in its attempts to have the New York Court of Appeals hear the case.

United States Court of Appeals for the Second Circuit in *General Electric Co. v. New York State Department of Labor*, 936 F.2d 1448 (2d Cir. 1991) ("*General Electric*").

As the court below held, *General Electric* is "clearly distinguishable" on the facts. *Sierra Telcom Services Inc. v. Hartnett et al.*, 174 A.D. 2d 279, at 285. In *General Electric*, the Second Circuit held that it would be an unconstitutional delegation of legislative power to private parties for the State to adopt a prevailing wage rate for public work from a collective bargaining agreement containing a two-tier wage which required the use of the higher of two wage rates on public work projects, whether or not that rate was actually paid in the private sector 936 F.2d at 1455. In this case there is no evidence, or even allegation, that the prevailing wage rate for telephone installation was not actually paid under the collective bargaining agreement in the private sector.

In addition, Sierra lacks standing to challenge the State of New York's withholding of money otherwise due to Ericsson because there is nothing in the record demonstrating that this act caused Sierra any injury. Even if Sierra could demonstrate some injury, it has not demonstrated a constitutionally protected property interest in Ericsson's money necessary to succeed on a procedural due process challenge. In any event, the challenge is moot since the money is no longer being held. The money was released to the workers when the Commissioner found, after a hearing, that they had been underpaid wages. The only relief sought in this action is a review of the Commissioner's Order on the merits of the parties' claims.

Finally, there is no special or important reason for this Court to issue a writ of certiorari to review the constitutionality of the admission of three workers' statements where Sierra itself neither attempted to call the workers nor demonstrated any inability to do so.

REASONS FOR DENYING THE WRIT

1. THIS DECISION OF THE NEW YORK STATE SUPREME COURT, APPELLATE DIVISION, IS NOT IN CONFLICT WITH THE UNITED STATES COURT OF APPEALS DECISION IN *GENERAL ELECTRIC CO. vs. NEW YORK STATE DEPARTMENT OF LABOR*

The Appellate Division properly rejected Sierra's unconstitutional delegation claim finding this case distinguishable from the *General Electric* case. *Sierra Telcom Services Inc. v. Hartnett et al.*, 174 A.D.2d at 285. In *General Electric*, the Second Circuit held that New York's prevailing wage law was not an unconstitutional delegation of legislative power to private parties so long as the Department exercised its statutory discretion to reject wage rates contained in collective bargaining agreements which were not actually paid in the private sector. 936 F.2d at 1456. In that case, General Electric alleged that the wage rate it was being required to pay was not actually paid in the private sector[11] but that the wage rate contained in the wage schedule designated was the "public work" rate contained in a collusively negotiated collective bargaining agreement which contained two wage rates for the same work, a private sector wage rate and a higher public work wage rate. General Electric further alleged that the lower private sector wage rate was excluded from public work by the language of the collective bargaining agreement and, because of that language, the Department had *pro forma* promulgated only the higher wage rate as the prevailing wage rate. 936 F.2d at 1457. The Second Circuit held that if General Electric could

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[11] The Department contested these allegations, but the Second Circuit held that it must take them as true for purposes of the appeal. 936 F.2d at 1458-59.

prove these factual allegations, it would establish an unconstitutional delegation of legislative power to private parties in violation of the Fourteenth Amendment to the United States Constitution. 936 F.2d at 1457-8.

In this case, there are no such allegations and no such evidence. In fact, it is clear that the Department rejected a wage rate, contained in the linemen's collective bargaining agreement covering telephone installation, because no work had been done under that agreement in the locality of the project. Thus, that wage rate was not actually paid in the private sector in the locality. Instead, the Department used the wage rates in the Local 631 IBEW Telephone Interconnect Agreement because those wages were actually paid for telephone installation in the private sector in the locality of the project.[12]

Sierra's claim that the Department's actions are in conflict with the *General Electric* decision because it classified workers on the project according to the practices under the collective bargaining agreement misreads *General Electric* (Petition P. 15). In *General Electric*, the Second Circuit held that the use of collective bargaining agreements in setting prevailing wages was *not* constitutionally infirm so long as the wages rates used were actually paid under those agreements in the private sector. 936 F.2d at 1456.

Moreover, Sierra's claim that the Department's actions were unconstitutional because the telephone classification was applied to all workers, regardless of job duties or skill level, to entitle

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[12] Sierra's claim that the Department used Local 631's Collective Bargaining Agreement to determine the scope of the wage rates covered by the agreement because Local 631 claims "it controls all jobs on a public telephone interconnect project in its area" (Petition p. 15) is sheer fabrication. Local 631 made no claims to controlling anything. Instead, the Department used the agreement to determine the scope of the work the wage rates in that agreement covered.

everyone to the pay of a technician ignores the facts (Petition p. 15). With the exception of the nine workers it classified as telephone workers, Sierra itself classified each worker on the project as a technician. The only issue in the case was whether the proper wage rate for the technicians was the linemen rate or the telephone rate. The linemen wage rates were not paid in the private sector in the locality for telephone work. Thus, the Department's determination that Sierra was required to pay telephone wage rates was not in conflict with *General Electric*.

2. SIERRA HAS NO STANDING TO CHALLENGE THE STATE OF NEW YORK'S WITHHOLDING OF MONEY FROM ERICSSON

In order to invoke the jurisdiction of this Court, Sierra must demonstrate that it has 1) personally suffered some actual or threatened injury as a result of the putatively illegal conduct of the State 2) that the injury can be fairly traced to the challenged action and that 3) the injury is likely to be redressed by a favorable decision. *ASRACO Inc. v. Kadish*, 490 U.S. 605, 619, (1989) *Valley Forge Christian College v. Americans United for Separation of Church and State*, 454 U.S. 464, (1982). With regard to its procedural due process challenge to the State's withholding of money from Ericsson, Sierra can demonstrate none of these.

Sierra challenges the Department's action in withholding money from Ericsson as violating its right to procedural due process. The State never withheld any money from Sierra and Sierra acknowledges that in its petition (Petition p. 6-7). Sierra claims, however, that Ericsson in turn withheld money from

it.[13] The assertion is insufficient to confer standing upon Sierra because no such fact is contained in the record.[14] Second, even if this assertion were supported by the record, there are no facts from which this Court could conclude that Ericsson's withholding from Sierra depended on the State's withholding of money from Ericsson, or that the withholding of Sierra's money by Ericsson is likely to be redressed by an order of this Court.

The record does contain the subcontract entered into by Ericsson and Sierra. That contract provides that "Ericsson may withhold money due for claims which might be the subject of reimbursement to Ericsson by the subcontractor" (A 765). The Department, by virtue of its investigation and its estimation of wage underpayments, had a claim against Ericsson which would be subject to reimbursement by Sierra. Thus, even absent the Department's withholding of money from Ericsson, Ericsson was authorized by the subcontract to withhold money from Sierra. Moreover, even if this Court were to order the State to release Ericsson's money that would not necessarily redress Sierra's injury.[15] Under the terms of the subcontract,

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[13] Sierra correctly states, in its Statement of the Case, that the State withheld money from Ericsson (Petition p. 6). However, its argument is premised upon the admittedly incorrect fact that it was Sierra's property that was seized (Petition p. 19, 22). Sierra never attempts to explain or justify this factual misstatement.

[14] Sierra's assertion that Ericsson withheld money from it is without citation to the record, as well it must be. Counsel for respondents has searched the record and can find no evidence of this alleged withholding which Sierra raises for the first time in this Court.

[15] The only relief that might redress Sierra's injury is a reversal of the Commissioner's order on the merits of the underlying claims. Sierra has never demonstrated that it would be entitled to that relief if it were to succeed on its procedural due process challenge to the withholding of money with a prior hearing.

so long as the claims are outstanding Ericsson is entitled to withhold money from Sierra. That entitlement is not conditioned upon the State's withholding of money from Ericsson.

Even if Sierra had standing, its procedural due process claim would fail on the merits because Sierra does not have a property interest in Ericsson's money. Sierra claims that the State deprived it of property without providing constitutionally adequate procedures. In order to succeed on the merits of this claim, Sierra must demonstrate that it has a property interest in the money the State withheld from Ericsson. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985). Property interests are not created by the Constitution but by independent sources, such as state law. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Sierra bases its claim on the factually flawed premise that it was Sierra's property which the State seized. Sierra has shown no protected property interest in money due to Ericsson and, as such, cannot succeed on the merits of its claim.

Finally, the money which the State withheld from Ericsson has been released to the workers pursuant to the Commissioner's Order issued after a hearing. Thus, Sierra's claim that it was a violation of due process to withhold money without a prior hearing is moot.[16]

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[16] Sierra did not request damages; it sought only to review the Commissioner's Order and Determination pursuant to Labor Law § 220-b(2).

3. THERE WERE NO CONSTITUTIONAL INFIRMITIES IN THE CONDUCT OF THE HEARING

The only other issue properly preserved is whether it was unconstitutional for the hearing officer to admit into evidence written statements of three workers. Sierra has shown no special reason why this Court should grant a writ of certiorari to review the admission of three pieces of evidence for which the only purpose was to demonstrate that those three workers performed work on the project which entitled them to be paid a telephone wage rate other than the lowest one on the schedule.[17] Moreover, Sierra's claim that it was denied the right to cross examine these workers cannot succeed absent Sierra's attempt to call the workers, its own employees, itself. The issue is plainly not of general importance.

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[17] Sierra's claim that these statements were the only evidence of work performed on the project is untrue (Petition p. 28). The project specifications described all the work to be done on the project and that, along with Sierra's payroll records, described the work done by all the workers was technical work involving the installation of a telephone system. The evidence was introduced without objection.

CONCLUSION

FOR ALL THE FOREGOING REASONS, RESPONDENTS RESPECTFULLY REQUEST THAT THE PETITION FOR A WRIT OF CERTIORARI BE DENIED

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February 11, 1993

APPENDIX

§ 223. Enforcement of article

If the fiscal officer as defined herein finds that any person contracting with the state, a municipal corporation, or any commission appointed pursuant to law, for the performance of any public work fails to comply with or evades the provisions of this article, he shall present evidence of such noncompliance or evasion to the officer, department, board or commission having charge of such work for enforcement. Wherein such evidence indicates a noncompliance or evasion on the part of a subcontractor, the contractor shall be responsible for such noncompliance or evasion. It shall be the duty of any officer, department, board or commission in charge of the construction of such public work contracts to enforce the provisions of this article.

(L.1921, c. 50; amended L.1935, c. 929, § 1.)

No. 92-1019

(3)

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1992

SIERRA TELCOM SERVICES, INC.,

Petitioner,

against

THOMAS F. HARTNETT, in his capacity as Commissioner of Labor, and STATE OF NEW YORK DEPARTMENT OF LABOR,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

REPLY BRIEF TO BRIEF IN OPPOSITION TO PETITION

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PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK STATE COURT OF APPEALS

Reply Brief to Brief in Opposition to Petition

ARGUMENT

POINT I

Sierra has standing to challenge the State of New York's seizure of Sierra's property; the question is not moot

Standing

The State's position that Sierra has no standing to challenge the withholding of funds without a hearing because

those funds were withheld from Ericsson rather than from Sierra is absolutely wrong.

The State's brief ignores State law.

Under New York State law, all monies received by a contractor under a public improvement contract are held by that contractor as the trustee of a trust. The trust is comprised of funds received by the contractor and funds due the contractor for the benefit of those people supplying material and/or labor on the improvement. The trustee, in this case Ericsson, has no beneficial interest in that money until all of its subcontractors and suppliers have been paid in full. New York State Lien Law § 70, *et seq*. This Court has specifically acknowledged that relationship in *Aquilino v. United States*, 363 U.S. 509 (1960).

Sierra is the party charged with failure to pay the prevailing wage. Sierra is the party found not to have paid the prevailing wage. Sierra is the party against whom the deficiency was assessed. Sierra is the party against whom interest on the deficiency was assessed. Sierra is the party against whom a penalty was assessed. Sierra is the party found to be in wilful violation of the statute. Sierra is the beneficial owner of the money seized. Ericsson's only role was as a trustee of monies due or to become due to Sierra.

Sierra suffered actual injury as a result of the illegal conduct of the State. That injury was the deprivation of the trust fund to which it was entitled.[1]

[1]Sierra was also found to have committed a wilful violation of the Labor Law. In New York State, if a contractor has two or more wilful violations on its record, it can no longer bid on public contracts.

That injury can be fairly traced to the action of the State in that they withheld the trust res so that it was not available for use by the beneficiary.

The injury will be redressed by a decision in Petitioner's favor in that the seized trust funds will be made available for the use of the beneficiary.[2]

Mootness

The State's assertion that it has paid the funds it withheld to the workers[3] pursuant to the Commissioner's order is irrelevant here. It certainly does not render Sierra's claims of unconstitutionality of the statute as applied moot. Regardless of what the State has done with the money, if its acts were unconstitutional, it must return to Sierra the property unlawfully seized. A hearing finding against Sierra cannot cleanse the taint of the State's denial of Sierra's procedural due process. Sierra was deprived use of its funds and, regardless of where that money is today, the State is still accountable to Sierra for this blatant violation of its

[2]Respondents wrongly contend that the only relief that might redress Sierra's injury is a reversal of the Commissioner's order on the merits of the underlying claims. (Respondents' brief, p. 13 n. 15). This is wrong. Sierra is not seeking a reversal of the Commissioner's order on the merits of the underlying claims. It is seeking, pursuant to *General Electric Co. v. New York Department of Labor*, 936 F.2d 1448 (2d Cir. 1991), a declaration that the subject statute as applied is an unconstitutional delegation of the State's legislative authority and constitutes a violation of Sierra's due process rights. A decision in Sierra's favor on either issue will redress Sierra's injury.

[3]Counsel for Sierra has made two Freedom of Information Act requests to the Department, attempting to ascertain the disposition of the withheld money. Both requests have gone unanswered. The State now claims that it has disbursed the funds to the workers. There is no evidence indicating that is the case.

constitutional rights. Contrary to the State's assertion, the issue is not moot.

Conclusion

For the reasons set forth in the Petition and herein, it is respectfully submitted that the petition for certiorari should be granted. In the alternative, it is respectfully requested that this Court reverse and remand this case to the New York State Court of Appeals for a determination of whether the decision of the Commissioner of Labor and the Appellate Division significantly conflict with the holdings of this Court and the United States Court of Appeals for the Second Circuit as set forth in the questions presented and for such other and further relief as is appropriate.

Respectfully submitted this 22nd day of February, 1993.

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